91-162

Supreme Court, U.S.
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No. 91-___

In The

Supreme Court of the United States

October Term, 1991

JOYCE INABA, SHARON HANNAH, GENEVIEVE KINNEY, LARRY TEST, PATRICK W. NAUGHTON, JANICE KIDO, SONJA NOTZ, WINIFRED TATSUTA, JUDITH MILLER, ELEANOR STERLING and JEANETTE JUSTICE, as Individuals,

Petitioners,

vs.

ROSEMARY SOONG and JAMES SOONG,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITION FOR A WRIT OF CERTIORARI

WARREN PRICE, III*
Attorney General
State of Hawaii
*Counsel of Record

GIRARD D. LAU
STEVEN S. MICHAELS
Deputy Attorneys General
State of Hawaii

425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1363

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

1. Whether Petitioners, University officials sued in their individual capacity, are protected, in light of *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), and related authority, from liability by qualified immunity in a suit, brought pursuant to 42 U.S.C. § 1983, by a student who claims her dismissal by Petitioners from the University's Practical Nursing Program violated an alleged substantive due process right to continued enrollment free from arbitrary dismissal?

PARTIES BELOW

Petitioners Joyce Inaba, Sharon Hannah, Genevieve Kinney, Larry Test, Patrick W. Naughton, Janice Kido, Sonja Notz, Winifred Tatsuta, Judith Miller, Eleanor Sterling, and Jeanette Justice, as individuals, were defendants-appellants in the proceedings before the Supreme Court of the State of Hawaii.

Respondents Rosemary Soong and James Soong were plaintiffs-appellees in the proceedings before the Supreme Court of the State of Hawaii. The University of Hawaii at Hilo, not a petitioner in this case, was also a defendant-appellant in the proceedings before the Supreme Court of the State of Hawaii.

The Complaint below, pursuant to Hawaii practice, lists also as Defendants John Does 1-100, Jane Does 1-100, Doe Partnerships 1-100, Doe Corporations 1-100, and Doe Legal Entities 1-100. Plaintiffs below have not identified who the Doe parties are, and thus their naming below of such parties, without more, has no significance at this stage of the case.

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JOYCE INABA, SHARON HANNAH, GENEVIEVE KINNEY, LARRY TEST, PATRICK W. NAUGHTON, JANICE KIDO, SONJA NOTZ, WINIFRED TATSUTA, JUDITH MILLER, ELEANOR STERLING and JEANETTE JUSTICE, as Individuals,

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Joyce Inaba, Sharon Hannah, Genevieve Kinney, Larry Test, Patrick W. Naughton, Janice Kido, Sonja Notz, Winifred Tatsuta, Judith Miller, Eleanor Sterling, and Jeanette Justice, as individuals, respectfully pray that a writ of certiorari issue to review the opinion, order denying reconsideration, and judgment of the Supreme Court of the State of Hawaii entered in the above-entitled proceeding on April 8, 1991, April 26, 1991, and May 16, 1991, respectively.

OPINIONS BELOW

The Memorandum Opinion of the Supreme Court of the State of Hawaii dated April 8, 1991 is unreported and is printed in Appendix ("App.") "A," *infra*. The Order Denying Reconsideration dated April 26, 1991 is unreported and is printed in App. "D." The Judgment on Appeal dated May 16, 1991 is unreported and is printed in App. "E." The Decision, Order on Defendants' Motion to Dismiss or in the Alternative for Summary Judgment of the Circuit Court of the Third Circuit, State of Hawaii, dated June 25, 1990 is unreported and is printed in App. "B." The Amended Order on Defendants' Motion to Dismiss or in the Alternative for Summary Judgment of the state Circuit Court, dated July 12, 1990, is also unreported and is printed in App. "C."

JURISDICTION

The opinion, and, for the purposes of this Court, the judgment, of the Supreme Court of the State of Hawaii was entered April 8, 1991. A timely Motion for Reconsideration was filed on April 18, 1991, and denied on April 26, 1991. The time in which this Petition may be filed therefore extends to and includes July 25, 1991, and this Petition is timely. Jurisdiction in this Court is invoked under 28 U.S.C. § 1257.

The denial of a claim of qualified immunity is an appealable "final judgment," within the meaning of the "collateral order" doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985); *see also Siegert v. Gilley*, 111 S. Ct. 1789, 1793-94 (U.S. May 23, 1991). That doctrine applies to

review of state court judgments that fall within its scope. *Id.* at 525 n.8 (citing *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963); *Construction Laborers v. Curry*, 371 U.S. 542 (1963)); *see also National Socialist Party v. Village of Skokie*, 432 U.S. 43, 44 (1977) (per curiam). The judgment of the Supreme Court of Hawaii is therefore properly brought here for purposes of determining its compliance, in this federally-based action under 42 U.S.C. § 1983, with the decisions of this Court interpreting the "protective" doctrine of qualified immunity. *See Burns v. Reed*, 111 S. Ct. 1934, 1944 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1985)). Therefore, the Hawaii Supreme Court's judgment rejecting Petitioners' claim of qualified immunity is a "final judgment" for purposes of § 1257.

Although the Hawaii Supreme Court, in affirming, also remanded the case with the instruction that the trial court decide whether Rosemary Soong had exhausted all her administrative remedies before resorting to judicial action, this remand with instructions does not defeat the finality of the State Supreme Court's judgment. Even if the state trial court were to rule that Rosemary failed to exhaust her administrative remedies and therefore dismiss the case, the Petitioners would be forced to suffer, in the interim period prior to any such ruling, the "burdens of litigating" the exhaustion issue, including that of any discovery related thereto, prior to any authoritative resolution of the immunity question. Petitioners may also be subject to burdensome procedures on other matters prior to trial court resolution of the exhaustion issue. App. "C" (discovery may be resumed after the appeal). These are exactly the burdens that Petitioners are entitled to avoid by invoking this Court's authority to review the collateral

order in this case. *See, e.g., Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991).[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that

> [No State shall] deprive any person of life, liberty, or property, without due process of law . . . .

Section 1983 of Title 42 of the United States Code provides in relevant part that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any Citizen of the United States or other person within the jurisdiction thereof to the

---

[1] Moreover, if the state trial court rules Rosemary did exhaust all her administrative remedies, making a trial inevitable, there is no guarantee Petitioners would be allowed an interlocutory appeal under § 641-1(b), Haw. Rev. Stat., or that the state courts would entertain the appeal under the collateral order doctrine at that time. Thus, the judgment here fits the third category of cases in which this Court has treated the decision on a federal issue as a final judgment for purposes of Section 1257 without awaiting the completion of the proceedings anticipated in the lower state courts. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477, 481-82 (1975) (review allowed where "if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review."); *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156, 162-64 (1973).

> deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In 1985, this Court, in *Regents v. Ewing*, 474 U.S. 214 (1985), declined to decide the important and far-reaching federal issue whether the Fourteenth Amendment gives a *substantive* right of "Due Process of Law" that, equal protection concerns aside, permits the lower courts, in suits under 42 U.S.C. § 1983, to review the substance of academic decision-making by State university-level instructors and administrators.

Despite the absence of any authoritative resolution of this question by this Court and substantial lower court case law refusing to decide the issue or holding, outright, that such a right does not exist, the Hawaii state courts have rejected, in a suit brought in the state courts pursuant to 42 U.S.C. § 1983, eleven individual defendants' claims of qualified immunity to a student's suit contending that she was improperly terminated from a nursing program. Indeed, the lower courts did so even though the only evidence against Petitioners consisted of opinion evidence going not to whether Petitioners exercised academic judgment, but whether they made the right choice among a range of professional options. The issue in this case is whether the Hawaii Supreme Court was correct in rejecting the defense of qualified immunity here.

Respondent Rosemary Soong was admitted to the Practical Nursing Program at Hawaii Community College, a division of the University of Hawaii at Hilo, in the Fall 1986 semester. App. "F" ¶¶ 7, 12; Pet. App. 17, 18. In the Spring 1987 semester Rosemary enrolled in Nursing 22, whose instructors were Petitioners Joyce Inaba and Sharon Hannah. *Id.* ¶¶ 15, 16; Pet. App. 18. Rosemary received failing grades or no grades on much of her work. *Id.* at ¶¶ 22, 26, 32; Pet. App. 19-21. She was counseled by Inaba to withdraw or fail the course. *Id.* ¶ 33; Pet. App. 21.

Rosemary withdrew from the Practical Nursing Program and subsequently filed a grievance against Inaba and the Practical Nursing Program. *Id.* ¶ 50; Pet. App. 24. Petitioner Janice Kido, Chairperson of the General Education and Public Services Division, and Petitioner Patrick W. Naughton, Acting Provost, both ruled that the grievance was without merit. *Id.* ¶¶ 51, 54 Pet. App. 24. Nevertheless, Rosemary was permitted to reenroll in the Practical Nursing Program with a waiver of tuition for the 1988 Spring and Summer semesters. *Id.* ¶ 56; Pet. App. 25.

In January 1988, Rosemary reenrolled in the Program and in Nursing 22. Petitioners Sonja Notz and Sharon Hannah taught the class. *Id.* at ¶¶ 59, 60; Pet. App. 25-26. On February 8, 1988, Notz presented Rosemary a list of about 34 items detailing deficiencies in her clinical performance that semester; Notz and Hannah then placed Rosemary on "Probationary Status" and gave her a list of 13 conditions of probationary status. *Id.* ¶¶ 61, 62 Pet. App. 26. Notz later issued a memorandum to Rosemary detailing her deficiencies and relating them to the 13-item

probationary status list. *Id.* at ¶ 63; Pet. App. 26. On February 17, 1988, the University's Admissions and Progression Committee, composed of Petitioners Hannah, Genevieve Kinney, Larry Test, Winifred Tatsuta, Judith Miller, Eleanor Sterling, and Jeanette Justice, recommended that Rosemary be dropped from the Practical Nursing Program. *Id.* ¶ 65; Pet. App. 26.

Rosemary withdrew from the Program and, along with her then husband Respondent James Y.F. Soong, filed this action in the Circuit Court of the Third Circuit, State of Hawaii, on July 22, 1988 against Petitioners and the University of Hawaii at Hilo. App. "F." The complaint's first five counts arose under state law, and ran solely against the University. *Id.* at ¶¶ 67-92 Pet. App. 27-34. In Count VI, plaintiffs sued Petitioners in their individual capacities under 42 U.S.C. § 1983, alleging that they, under color of state law, violated her purported substantive due process right not to be arbitrarily and capriciously forced to withdraw from the University's Practical Nursing Program. *Id.* at ¶¶ 93-97; Pet. App. 34-35. The complaint sought only money damages and requested no injunctive relief against the Petitioners. *Id.* In their answers to the complaint, all of the Petitioners raised the defense that "Plaintiffs' claims as set forth in the Complaint are barred by the doctrine of qualified immunity." Answers to Complaint, 1 Record on Appeal 41, 57, 72, No. 88-235 (Haw. 1990).

On March 22, 1990, Petitioners and the University moved for dismissal, or in the alternative, summary judgment under Haw. R. Civ. P. 56, which is identical in all respects to its federal analogue. *See First Hawaiian Bank v. Weeks*, 70 Haw. 392, 772 P.2d 1187 (1989). Respondents

Soongs, in opposing the motion, submitted, *inter alia*, an affidavit of Rosemary Burnett, a former director of the Nursing Program, who reviewed various files and documents in the case. App. "I." Burnett concluded that there was "no substantive documentation to support the request for Rosemary Soong's withdrawal," and that the reports of unsatisfactory clinical performance were inadequately justified, and that there were "numerous errors, inconsistencies and contradictions," placing upon Rosemary expectations "not in line with either national standards or licensing standards." Pet. App. at 54. In their papers in the state trial court, Petitioners contended, *inter alia*, that they must be dismissed from the action under the doctrine of qualified immunity because there was no clearly established substantive due process right not to be arbitrarily dismissed from a University Program.[2] On June 25, 1990, the circuit court summarily denied Petitioners' qualified immunity claims, *see* App. "B"-"C" (Pet. App. 6-10), thereby effectively denying Petitioners' federal defense.

Petitioners and the University of Hawaii at Hilo took, with leave of court granted under Haw. Rev. Stat. § 641-1(b) (1985), an interlocutory appeal to the Supreme Court of the State of Hawaii. The Petitioners again argued[3] that they should have been dismissed from the

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[2] To see precisely how this federal question was raised in Defendants' memoranda in the Circuit Court for the Third Circuit, State of Hawaii, see Pet. App. "G" (Pet. App. 37-39).

[3] To see precisely how this federal question was raised in Petitioners' briefs in the Supreme Court of Hawaii, see Appendix "H" for the relevant quotations from our briefs.

case, or summary judgment should have been entered in their favor, on the ground of qualified immunity because there was no established substantive due process right to continued enrollment in the context of the facts here.

On April 8, 1991, the Hawaii Supreme Court, in a Memorandum Opinion dated April 8, 1991, affirmed the trial court's rulings to date with respect to immunity in their entirety, stating:

> After a careful review of the record in the present case, we find that Soong offered evidence that raised the issue whether Defendants actually followed university guidelines on dismissal and whether Soong's dismissal was a substantial departure from the accepted academic norm. Thus, we find that the trial court did not err by denying Defendants' motion.

Pet. App. 4a. The Hawaii Supreme Court thereby implicitly rejected Petitioners' claim that they should be dismissed from the lawsuit under the doctrine of federal qualified immunity.

Petitioners and the University of Hawaii at Hilo timely filed a Motion for Reconsideration in the Hawaii Supreme Court and again argued, *inter alia*, that qualified immunity should warrant the Petitioners' dismissal from the case. The Hawaii Supreme Court denied that Motion on April 26, 1991. App. "D."

REASONS FOR GRANTING THE WRIT

This case presents important and recurring questions concerning, in general, the doctrine of objective qualified immunity laid down by this Court in *Harlow v. Fitzgerald*,

457 U.S. 800 (1982), and the interaction of that doctrine with a broad class of decisions by this Court which explicitly recognize the unsettled nature of a claimed federal right, as well as, in particular, the functioning of *Harlow* immunity in an area of nationwide importance, namely, the amenability of state academic decision-making to federal substantive due process review.

On at least two occasions in the last fifteen years, this Court has explicitly refused to decide whether "federal courts can review an academic decision of a public educational institution under a substantive due process standard." *Regents v. Ewing*, 474 U.S. 214, 222 (1984) (citing *Board of Curators v. Horowitz*, 435 U.S. 78, 91-92 (1978)). These decisions to abstain on this most basic question, affecting potentially thousands of academic institutions, based on the prudential precepts stated in Justice Brandeis's famous concurrence in *Ashwander v. TVA*, 297 U.S. 288, 347 (1936), took as their premise that the arguments on both sides of this question were substantial and important, and at the least signified that state academic officials would not be " 'plainly incompetent' " under *Harlow* and its progeny in believing there is no federal right to substantive due process review. *Compare United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1985) (noting that *Ashwander* abstention is not needed when there is no "constitutional difficulty"), *with Burns v. Reed*, 111 S. Ct. 1934, 1944 (U.S. May 30, 1991) (*Harlow* immunity protects " 'all but the plainly incompetent' "). After all, a decision of this Court on a federal matter "must be followed" by the lower courts, including the state courts in suits under 42 U.S.C. § 1983, *see Hutto v.*

Davis, 454 U.S. 370, 375 (1982) (per curiam); *Ferri v. Ackerman*, 444 U.S. 193, 198 n.3 (1980), and this Court's considered decisions to abstain in *Horowitz* and *Ewing* should not be so easily slighted. *Cf. Hagans v. Lavine*, 415 U.S. 528, 543 (1974) (on instances in which a federal question is deemed insubstantial).

The judgment of the Supreme Court of Hawaii, in rejecting Petitioners' claims of qualified immunity in the face of this logic, directly conflicts with this Court's precedents, and frustrates this Court's ability to exercise its prudential power to note – and reserve judgment on – important federal claims of nationwide importance. Review should be granted on this basis alone. Indeed, the Supreme Court of Hawaii's judgment conflicts with substantial precedent in the federal courts of appeals, not only on the issue of whether there is a constitutional right to substantive review at *any* level, but upon the very issue of whether such a right is "clearly established."

In addition, even taken on its own terms, the lower court's approach to the evidence necessary to overcome *Harlow* immunity at the summary judgment stage, even assuming this Court had not reserved the basic merits issue in *Ewing* (and had thereby dictated a result, in the damages context, directly at odds with the result below), violates well settled immunity principles. *See, e.g., Anderson v. Creighton*, 487 U.S. 635 (1987). For this added reason, the petition for certiorari should be granted.

Because the Supreme Court of Hawaii did not have the benefit of this Court's most recent guidance in *Siegert v. Gilley*, 111 S. Ct. 1789 (U.S. May 23, 1991), and *Burns v. Reed*, 111 S. Ct. 1934 (U.S. May 30, 1991), the Court may

wish to grant the Petition, vacate the judgment, and remand for further consideration in light of *Siegert v. Gilley*, and *Burns v. Reed, supra*.

A. Review Should Be Granted Because the Hawaii Supreme Court's Judgment Holding that State Academic Officials are Not Immune From Money Judgments on Claims for Federal Substantive Due Process Review of Academic Decisions Fundamentally Breaches Not Only this Court's Prescribed Procedure for Resolving Immunity Claims But Also Explicit Precedent that Dictates Immunity Here.

As this Court reaffirmed only weeks ago in *Burns v. Reed*, 111 S. Ct. 1934 (U.S. May 30, 1991), the doctrine of qualified immunity that obtains for public officials called upon to defend claims for personal liability under 42 U.S.C. § 1983 is a "protective" one which " 'provides ample support to all but the plainly incompetent or those who knowingly violate the law.' " *Id.*, at 1944 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). As the Court emphasized in *Siegert v. Gilley*, 111 S. Ct. 1789 (U.S. May 23, 1991), "[o]nce a defendant pleads a defense of qualified immunity, '[o]n summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred.' " *Id.* at 1793 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Thus, "[u]ntil this threshhold immunity question is resolved, discovery should not [even] be allowed.' " *Id.* (also quoting *Harlow*). In turn, "[t]he contours of the [claimed federal] right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. In

light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The right to immunity is strong, and compels this Court to grant certiorari to spare petitioners from the "general costs of subjecting officials to the risks of trial – distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The right conferred by immunity is "an *immunity from suit* rather than a mere defense to liability; and it is effectively lost if a case is erroneously permitted to go to trial." *Id.* The judgment of the Supreme Court of Hawaii ignored all these precepts, and warrants review and reversal.

1. The Decision of the Supreme Court of Hawaii Not to Grant Qualified Immunity to Academic Officials Charged With Breaching a Substantive Due Process Right Whose Existence This Court Has Twice Abstained from Recognizing Generates an Egregious Conflict with This Court's Decisions.

As clarified by *Siegert v. Gilley*, 111 S. Ct. 1789 (U.S. May 23, 1991), "the proper analytical framework for determining whether a plaintiff's allegations are sufficient to overcome a defendant's defense of qualified immunity asserted in a motion for summary judgment" requires the reviewing Court to assess the "purely legal question" whether the alleged right that is claimed to have been violated is "clearly established" at the time of defendants' actions. *Id.* at 1793. It is improper for a court to "assume[] without deciding" any "preliminary issue"

of federal law incident to the *Harlow* immunity inquiry. *Id.*

Siegert makes clear that the judgment below is in error, and must be reversed, as the only precedent cited in support of the Supreme Court of Hawaii's rejection of Petitioners' immunity claim was a decision of this Court, *Regents v. Ewing*, 474 U.S. 214 (1985), which itself not only did not establish the claimed right here in any sense, but authoritatively abstained from establishing such a federal right for prudential reasons that reflect a judgment that a substantive due process right to continued enrollment in professional school is beset by constitutional difficulty. Indeed, from the fall of 1986 through the final recommendation that Rosemary be dropped from the Nursing Program in February of 1988, there was plainly no clearly established substantive due process right of a university student not to be arbitrarily dismissed from enrollment in a university program. As all nine Justices stated in *Ewing*:

> In *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 91-92 (1978), we assumed, *without deciding*, that federal courts can review an academic decision of a public educational institution under a substantive due process standard. In this case Ewing contends that such review is appropriate because he had a constitutionally protected property interest in his continued enrollment in the Inteflex program. But remembering Justice Brandeis' admonition not to " 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,' " *Ashwander v. TVA*, 297 U.S. 288, 347 (1936), we again conclude, as we did in *Horowitz*, that the precise facts disclosed by the record afford the most appropriate basis for decision. We therefore accept the University's

> invitation to "*assume* the existence of a constitutionally protectible property right in [Ewing's] continued enrollment," and hold that *even if* Ewing's assumed property interest gave rise to a substantive right under the Due Process Clause to continued enrollment free from arbitrary state action, the facts of record disclose no such action.

474 U.S. at 222-23. Indeed, there could be no mistake that the very existence of "a substantive due process" right to "review [of] an academic decision of a public educational institution" was authoritatively put in doubt by the *Ewing* majority, since, only eight days before deciding *Ewing*, this Court reaffirmed that the abstention rule set forth in the famous *Ashwander* concurrence applies solely to those instances in which there is a substantial "constitutional difficulty" that could be avoided by statutory construction or (as in *Ewing*), by a decision that rests on narrow grounds. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1985) (citing *Ashwander*).

In relying on this Court's admonitory language in *Ewing*, setting forth the parameters of what might be "a substantive due process standard" for federal "review [of] an academic decision of a public educational institution," *see* 474 U.S. 222, 225, without recognizing the doctrinal fragility of that proposed standard, the Supreme Court of Hawaii misread this Court's decision in *Ewing*, or, at the least, deviated from "the proper analytical framework" for immunity. *Siegert, supra*.

Indeed, given the concurring opinion of Justice Powell in *Ewing*, an opinion not substantially refuted by the Court, the error of the Supreme Court of Hawaii in this case could not be clearer. As Justice Powell observed, the

Ewing Court made two assumptions, and thereby refused to decide, on prudential grounds, two distinct federal questions. The first assumption was that there is a "property" right in continued enrollment. *See* 474 U.S. at 222 n.7 & 223. The second assumption was that such a property right, assuming it exists, is protected under *substantive* due process. *Id* at 223. That the Court refused to decide both means that there was no "clearly established" law on two distinct fronts, each necessary here to Respondents' effort to overcome *Harlow* immunity. As Justice Powell wrote:

> As the Court correctly points out, respondent's claim to a property right is dubious at best. Even if one assumes the existence of a property right, however, not every such right is entitled to the protection of substantive due process. While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, substantive due process rights are created only by the Constitution.

Ewing, 474 U.S. at 229 (Powell, J., concurring) (citations omitted). Thus, not only did Justice Powell confirm the entire Court's reluctance to find a "property right," calling it "dubious at best," he also explicitly concluded that there was no *substantive* due process protection for such a right.

> The interest asserted by respondent – an interest in continued enrollment . . . – is essentially a state-law contract right. It bears little resemblance to the fundamental interests that previously have been viewed as implicitly protected by the Constitution. It certainly is not closely tied to "respect for the teachings of history, solid recognition of the basic values that

> underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms." For these reasons, briefly summarized, I do not think the fact that Michigan may have labeled this interest "property" entitles it to join those other, far more important interests that have heretofore been accorded the protection of substantive due process.

Ewing, 474 U.S. at 229-30 (Powell, J.) (citations omitted).[4]

The Supreme Court of Hawaii's misunderstanding of the analytic structure of the *Ewing* majority opinion gravely threatens the operation of qualified immunity in Hawaii, not just in the numerous cases where frustrated students might wish to obtain review, under compulsion of federal law, of academic performance evaluations, but in the numerous cases where this Court has expressly assumed, but, in the face of prudential concerns, not decided, the validity of constitutional arguments that are necessary and material to a § 1983 litigant's underlying claim. Indeed, insofar as the doctrine of qualified immunity is intended precisely to serve prudential interests by resting personal liability on a legal question that is

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[4] Furthermore, other decisions by this Court put the existence of such a substantive due process right in doubt, if they do not demonstrate that such a right does not exist outright. *See, e.g., DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 202 (1989) (Due Process Clause was not meant to transform every tort committed by a state actor into a constitutional violation); *Horowitz*, 435 U.S. at 89-90 (the decision whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information not readily adapted to the tools of judicial decisionmaking).

strictly "collateral" to the underlying merits, *see Mitchell v. Forsyth*, 472 U.S. 511 (1985), the judgment below undermines principles of judicial restraint that inhere in constitutional adjudication – principles which are "beyond debate." *Compare DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) *with Siegert v. Gilley*, 111 S.Ct. at 1795 (Kennedy, J., concurring in the judgment); *and id.* at 1795-97 (Marshall, Blackmun, and Stevens, JJ., concurring in part and dissenting in part) (quoting *Illinois v. Gates*, 462 U.S. 213 (1983)).

Because the Supreme Court of Hawaii did not have the benefit of this Court's decision in *Siegert v. Gilley, supra*, and *Burns v. Reed, supra*, both of which substantially clarify the doctrinal scope and procedure in connection with *Harlow* immunity, the Court may wish to grant the petition, vacate the judgment, and remand for further consideration in light of *Siegert* and *Burns*. However, at the very least the Court should grant the petition to eliminate the substantial misapplication of qualified immunity principles and underlying constitutional standards which inhere in the judgment of the Hawaii court.

2. The Decision Below Sharply Conflicts With the Decisions of the Courts of Appeals Not only as to the Immunity Issue Here, but As to the Entire Basis for Respondents' Claim.

While the foregoing establishes conclusively the basis for review and reversal of the judgment below, it bears emphasis that the Supreme Court of Hawaii's decision here also sharply conflicts with the decisions of the federal courts of appeals.

In the most relevant Circuit,[5] The Ninth, *Seigert*, 111 S. Ct. at 1799 (Marshall, J., concurring in part and dissenting in part) (looking to circuit law); *Davis v. Scherer*, 468 U.S. 183, 191-92 (1984) (same); *cf. Ohio Civil Service Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988) ("[I]n the ordinary instance, to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, *its court of appeals* or itself." (emphasis added)), there is no Circuit case recognizing a substantive due process right to continue enrollment free from arbitrary dismissal. Indeed, the caselaw is to the contrary. *Cf. Lum v. Jensen*, 876 F.2d 1385, 1387, 1389 (9th Cir. 1989) (no Ninth Circuit precedent establishes substantive due process protection for public employment; court notes *Ewing*'s reluctance to recognize such protection for a student's continued enrollment).[6]

Indeed, at the time of defendants' actions, most other circuits had either refused to decide the issue, expressed serious doubts as to the existence of the right, or outright rejected the right. *See, e.g., Mauriello v University of Medicine and Dentistry of New Jersey*, 781 F.2d 46, 52 (3d Cir.

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[5] Petitioners submit that it contravenes basic principles of federalism for the Supreme Court of Hawaii to conclude that a right is "clearly established" for purposes of the Hawaii courts simply because the court of appeals with jurisdiction over Hawaii may have settled the issue. However, assuming that the base of decisions from which "clearly established" law may be found includes the relevant federal court of appeals, the Ninth Circuit would be the most relevant source of guidance on the immunity issue had this Court not authoritatively resolved that issue, at least for the time being, by its decision in Ewing.

[6] Nor is there any decision of the United States *District Court* for the District of Hawaii establishing such a right.

1986) (refusing to decide issue, but stating that "[w]e share Justice Powell's doubt about the existence of [] a substantive due process right" of a University student to continued enrollment); *Crook v. Baker*, 813 F.2d 88, 100 & n.7 (6th Cir. 1987) (declining to decide issue for same reason given in *Ewing*); *Akins v. Board of Governors of State Colleges and Univs.*, 840 F.2d 1371, 1376 (7th Cir. 1988) (noting *Ewing* and explicitly stating that "[n]o case from this [circuit] establishes" "[a university student's] substantive due process right to continued enrollment in [a] program"); *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986) (following Justice Powell's position in *Ewing* and stating that "[r]ights of substantive due process are founded not upon state provisions but upon deeply rooted notions of fundamental personal interests derived from the Constitution."); *Haberle v. University of Alabama in Birmingham*, 803 F.2d 1536, 1539 n.1 (11th Cir. 1986) ("This court will follow [*Ewing* and] assume a property interest, and [will] not decide the property issue now.").

Consequently, even if this Court were to look to the other federal circuits to find the clearly established substantive due process right not recognized by this Court, or the Ninth Circuit, it would only find further case law rejecting the right, doubting the right, or refusing to decide the issue, and a few decisions upholding a very limited version of the right. *E.g.*, *Schaper v. City of Huntsville*, 813 F.2d 709 (5th Cir. 1987). Such a mixed and conflicting group of decisions could hardly establish anything, let alone "clearly establish" it in the "relevant sense." *Anderson*, 483 U.S. at 640.

Indeed, the decision below, which refuses to even recognize, let along grant, Petitioners' immunity defense,

conflicts with decisions in the courts of appeals upholding immunity claims in virtually identical circumstances. In *Akins v. Board of Governors of State Colleges and Univs.*, 840 F.2d 1371 (7th Cir. 1988), ten former nursing students claimed that their purported substantive due process right to continued enrollment in the College of Nursing was violated by the College's termination of their education because of an alleged arbitrary and capricious academic policy. With factual circumstances and a legal claim that are essentially identical to the case at bar, the Court of Appeals for the Seventh Circuit expressly determined that the university officials were protected by qualified immunity from such a claim. Noting *Ewing*'s refusal to decide whether there is a substantive due process right to continued enrollment and the absence of any Seventh Circuit decision establishing such a right, the Court concluded:

> We believe that a university administrator, surveying these cases at the time the alleged activity described in the complaint took place, would have concluded that a substantive due process-based right to continued enrollment in a state-sponsored academic program was not clearly established. Therefore, the defendants in this case are protected from an action for damages by the doctrine of qualified immunity.

Akins, 840 F.2d at 1376-77. In short, the decision in *Akins* is directly and irreconcilably in conflict with the Hawaii Supreme Court's decision rejecting Petitioners' claim of *Harlow* immunity.

Similarly, in *Lum v. Jensen*, 876 F.2d 1385 (9th Cir. 1989), the Ninth Circuit held that state officials were protected by qualified immunity from a suit by a former

state employee who claimed that his substantive due process rights were infringed by the officials' arbitrary and capricious discharge of him from public employment. Although *Lum* concerns public employment rather than university enrollment, the issue of whether there is a substantive due process protection for those interests is similar. In fact, there was a stronger argument for clear establishment of a substantive due process protection for public *employment* than for university *enrollment* given the existence of a number of circuit court precedents to that effect and *Harrah Independent School Dist. v. Martin*, 440 U.S. 194 (1979) (per curiam), which summarily suggested the existence of substantive due process protection for some public employment. Noting that *Ewing*'s refusal to decide the issue of substantive due process protection for continued enrollment and Justice Powell's flat rejection of such a right demonstrated this Court's "uncertain[ty about] the nature of substantive due process protection," the Ninth Circuit concluded:

> In our view, the absence of binding precedent in this circuit plus the conflict between the circuits is sufficient . . . to undermine the clearly established nature of a right. Though they are charged with knowledge of constitutional developments, government officials are not required to predict the future course of constitutional law. . . . Absent a more explicit direction from the Supreme Court than that provided in *Harrah*, we are unable to say that the precedent in favor of a substantive due process right was sufficient to overcome the otherwise unsettled and contradictory case law. Thus, we conclude that there was no clearly established constitutional right to substantive due process protection of continued public employment.

> . . . [D]efendants are entitled to qualified immunity as a matter of law.

Lum, 876 F.2d at 1389-90 (citations omitted). Because the claim of a substantive due process right to continued university enrollment has less precedential support than substantive due process protection for continued public employment (given that *Ewing*, unlike *Harrah*, does not give any support for the idea of substantive due process protection), it is clear that the Ninth Circuit would also, given *Lum v. Jensen*, necessarily uphold qualified immunity from the claim asserted in the case at bar.

Thus, this Court should grant this petition for certiorari for the additional purpose of resolving the direct conflict between the Hawaii Supreme Court's decision and the contrary decisions of federal courts of appeals on the important and recurring issues of *Harlow* immunity in the university context.

B. Even if there Were a Clearly Established Substantive Due Process Right Not to be Arbitrarily Dismissed, The Decision Below Conflicts with This Court's Decisions Regarding the Manner in Which the Reasonableness of Official Conduct is to Be Measured for Purposes of Evaluating *Harlow* Immunity.

Even if this Court has not made sufficiently clear, in *Ewing*, the basis for a *Harlow* defense to *all* substantive due process claims arising out of negative academic performance evaluations, that would not be the end of the inquiry, even in cases where a genuine dispute of material fact may exist under the standard that was employed by the *Ewing* court to reject Ewing's claim on the merits.

Under that standard, relied on heavily by the Supreme Court of Hawaii in its opinion below:

> When judges are asked to review the substance of a genuinely academic decision, [] they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Ewing, 474 U.S. at 225. In refusing Petitioners' claim of qualified immunity by determining that there was evidence which created a genuine issue of fact as to the merits of Respondents' claim under this standard, the Supreme Court of Hawaii committed the very sort of error this Court identified in *Anderson v. Creighton*, 483 U.S. 635 (1987). There, the Court made clear that state officers subject to such general standards as whether "professional judgment" was exercised are entitled to immunity, even if a Court might determine, post hoc, that such judgment was not exercised, if it was nonetheless "objectively legally reasonable" to believe otherwise. *Id.* at 644. In this case, the evidence apparently relied upon by the Supreme Court of Hawaii, namely the Burnett affidavit, at most showed only Ms. Burnett's personal opinion that academic judgment was not exercised. This is plainly insufficient to show that no reasonable person could believe, on the facts conceded to be true by Plaintiff, that an academic determination to require Respondent's withdrawal from the Practical Nursing Program was beyond the pale of acceptable professional judgment. *See Anderson*, 483 U.S. at 646 n.6. Respondents failed to allege, in their complaint, "specific, nonconclusory factual allegations" which would demonstrate Petitioners

were plainly incompetent with respect to Rosemary Soong's clearly established federal rights, *Siegert v. Gilley*, 111 S. Ct. at 1795 (Kennedy, J., concurring in the judgment), and, in any case, their proof on summary judgment failed to show anything more than lapses in record keeping. *See* Pet. App. 54a. Under the "protective" doctrine of qualified immunity, *see Burns v. Reed*, 111 S. Ct. at 1944, such evidentiary lacunae are attributable to respondents. For this added reason, the writ should issue.

CONCLUSION

Because the Supreme Court of Hawaii did not have the benefit of this Court's recent decisions in *Siegert v. Gilley*, 111 S.Ct. 1789 (U.S. May 23, 1991), and *Burns v. Reed*, 111 S.Ct. 1934 (U.S. May 30, 1991), which clarify the manner in which qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), is to be applied, the Court may wish to grant the petition, vacate the judgment, and remand for further consideration in light of *Siegert v. Gilley*, and *Burns v. Reed, supra*. If the Court does not vacate and remand, it should grant the petition and ultimately reverse the judgment of the Hawaii Supreme

Court with respect to Respondents' claims against Petitioners.

Dated: Honolulu, Hawaii, July 25, 1991.

WARREN PRICE, III*
Attorney General
State of Hawaii
*Counsel of Record

GIRARD D. LAU
STEVEN S. MICHAELS
Deputy Attorneys General
State of Hawaii

425 Queen Street
Honolulu, Hawaii, 96813
(808) 586-1363

Counsel for Petitioners

APPENDIX "A"

NO. 14621

IN THE SUPREME COURT OF
THE STATE OF HAWAII

ROSEMARY SOONG and JAMES SOONG, Plaintiffs-Appellees, vs. THE UNIVERSITY OF HAWAII AT HILO, JOYCE INABA, SHARON HANNAH, GENEVIEVE KINNEY, LARRY TEST, PATRICK W. NAUGHTON, JANICE KIDO, SONJA NOTZ, WINIFRED TATSUTA, JUDITH MILLER, ELEANOR STERLING, JEANETTE JUSTICE, as individuals, Defendants-Appellants, and JOHN DOES 1-100, JANE DOES 1-100, DOE PARTNERSHIPS 1-100, DOE CORPORATIONS 1-100, AND DOE LEGAL ENTITIES 1-100, Defendants.	CIV. NO. 88-235 APPEAL FROM THE DECISION, ORDER ON DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT ENTERED ON JUNE 25, 1990 THIRD CIRCUIT COURT 1991 APR 8 AM 10:35 /s/ Sandra N. Yasui CLERK SUPREME COURT

MEMORANDUM OPINION

Defendants-Appellants University of Hawaii-Hilo and eleven of its instructors and administrators (collectively Defendants) bring an interlocutory appeal from a

Third Circuit Court order denying their motion to dismiss or in the alternative for summary judgment in favor of Plaintiffs-Appellees Rosemary and James Soong. We affirm, but remand with instruction.

I.

This case arises out of the constructive dismissal of Plaintiff-Appellee Rosemary Soong (Soong) from the University of Hawaii at Hilo's Practical Nursing Program. Soong contends that Defendant arbitrarily and capriciously forced her to withdraw from the school's nursing program in the Spring of 1987 and again in the Spring of 1988 for non-academic reasons.

II.

Soong was admitted into the Licensed Practical Nursing Program of Hawaii Community College in the Fall of 1986. She received passing grades for the fall semester. Soong enrolled for the Spring semester, but was unable to complete the semester because her instructors claimed Soong's work was deficient. Soong was allowed to withdraw or receive failing grades. Soong chose to withdraw. However, she did file a grievance in accordance with Student Academic Complaint Policy provided by the University. Soong agreed to suspend her grievance when the University allowed her to reenroll in the nursing program. Soong retained the right to reassert her grievance at a future date.

Soong reenrolled in the nursing program on January 8, 1988. After one month in the program, Soong was

notified of academic deficiencies. Soong's academic performance was referred to the Admissions and Progressions Committee of the University Nursing Department. The Committee reviewed Soong's performance and recommended she be dropped from the program. Soong learned of the recommendation and withdrew from the program at the end of February 1988. Soong never filed a grievance with the University regarding the actions of the Nursing Department following her second withdrawal.

On July 22, 1988, Soong filed a complaint in the Third Circuit Court alleging breach of contract and tort claims against the University and a 42 U.S.C. § 1983 action against the individual instructors and administrators. The complaint alleged that the Defendants arbitrarily and capriciously forced Soong to withdraw from the program in 1987 for non-academic reasons and forced her withdrawal in 1988 because Soong had previously filed an academic grievance against the instructors and the nursing program.

Defendant filed a motion to dismiss or in the alternative motion for summary judgment. The trial court denied Defendants' motion and granted Defendants permission to take an interlocutory appeal.

III.

On appeal, Defendants argue that as a matter of public policy, courts should not review the substance of an academic decision. Soong contends that the court may review academic decisions where it is shown that the dismissal was not a purely academic decision.

In *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), the Supreme Court of the United States reviewed the dismissal of a student from medical school and concluded that:

> When judges are asked to review the substance of a genuinely academic decision such as this one, they should show great respect for the faculty's professional judgment. *Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.*

Ewing, 474 U.S. at 225 (emphasis added).

The State is correct in stating the general rule that courts are to respect and defer when presented with genuinely academic decisions. However, there is an exception when there is a substantial departure from accepted academic norms which demonstrate lack of professional judgment. *Id.*

After a careful review of the record in the present case, we find that Soong offered evidence that raised the issue whether Defendants actually followed university guidelines on dismissal and whether Soong's dismissal was a substantial departure from the accepted academic norm. Thus, we find that the trial court did not err by denying Defendants' motion.

We affirm the trial court decision, but remand with the instruction that the trial court decide whether Soong has exhausted all her administrative remedies before resorting to judicial action.

DATED: Honolulu, Hawaii, April 8, 1991.

Harriet Yoshida Lewis (Annette Y.W. Chock and Charleen M. Aina, with her on the briefs), Deputy Attorneys General, for Defendants-Appellants	/s/ H. Lum /s/ Frank D. Padgett /s/ Yoshimi Hayashi /s/ J. Wakatsuki
William J. Rosdil (Paul K. Hamano, with him on the brief), for Plaintiffs-Appellees	/s/ Ronald T.Y. Moon

APPENDIX "B"

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

ROSEMARY SOONG and JAMES SOONG, Plaintiffs, vs. THE UNIVERSITY OF HAWAII AT HILO, et al., Defendants.	Civil No. 88-0235 DECISION, ORDER ON DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT THIRD CIRCUIT COURT STATE OF HAWAII FILED 90 JUN 25 PM 2:38 LISA TAKETA CLERK

DECISION, ORDER ON DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Defendants' Motion To Dismiss Or In The Alternative For Summary Judgment having come on for hearing before the Honorable Ernest Kubota on April 6, 1990 at 8:30 a.m. o'clock, and Plaintiffs having been represented by Paul Hamano, and Defendants having been represented by Annette Y. W. Chock, Deputy Attorney General, and the Court having reviewed all memoranda and affidavits submitted and having heard the arguments of counsel and being apprised in the premises, now hereby enters its decision.

The record of this case indicates that during the 1987 spring semester Plaintiff Rosemary Soong ("Rosemary") attended a nursing course, Nursing 022 (Practical Nursing II), at Hawaii Community College of the University of

Hawaii at Hilo ("University"). Rosemary withdrew in April 1987 but reapplied, was readmitted and enrolled in Nursing 022 for the 1988 spring semester. In February 1988 Rosemary was dismissed from the nursing program by the University for failing to meet expected academic standards. As a result of her dismissal Rosemary together with her former husband Plaintiff James Y. F. Soong brought this suit against the University and eleven individuals, who were her instructors and various University officials and administrators. In light of the multiple claims and multiple parties, a trial of this matter would be costly and lengthy. Trial is expected to run two weeks. Plaintiffs anticipate presenting sixteen witnesses; Defendants intend to present eight witnesses. Defendants must bring back three parties from the mainland for trial. Also, three other parties and witnesses must be brought in from the neighbor islands for trial. Consequently, in the interests of judicial economy, and inasmuch as the legal issues raised are of sufficient concern to all parties to support the granting of an interlocutory appeal, it is advisable for the speedy termination of this litigation to permit an interlocutory appeal pursuant to Hawaii Revised Statutes, Section 641-1(b). Further, the absence of any current Hawaii precedent clearly establishing Plaintiffs' claims for relief, supports the granting of an interlocutory appeal in this matter. There is no just reason for delay.

Accordingly, the Court concludes:

1. Defendants' Motion To Dismiss Or In The Alternative For Summary Judgment is denied with leave to file an interlocutory appeal.

2. All discovery in progress, including Court orders relating to discovery activities, is stayed pending the outcome of any appeal. In the event the appeal is not dispositive, discovery may be resumed. Trial should be set within six months of any disposition on appeal.

DATED: Honolulu, Hawaii, JUN 25 1990

/s/ ERNEST KUBOTA [SEAL]
JUDGE OF THE ABOVE-
ENTITLED COURT

APPENDIX "C"

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

ROSEMARY SOONG and JAMES Y. F. SOONG, Plaintiffs, vs. THE UNIVERSITY OF HAWAII AT HILO, et al., Defendants.	Civil No. 88-235 AMENDED ORDER ON DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT Hearing: April 6, 1990 Honorable Ernest Kubota THIRD CIRCUIT COURT STATE OF HAWAII FILED 90 JULY 12 AM 10:26 OLGA I. HAYASHI CLERK

AMENDED ORDER ON DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Defendants' Motion To Dismiss Or In The Alternative For Summary Judgment, having come on for hearing before the Honorable Ernest Kubota, Judge of the above-entitled Court, on April 6, 1990, at 8:30 a.m., with Paul K. Hamano, Esq. appearing on behalf of Plaintiffs, and Annette Y. W. Chock, Esq. appearing on behalf of Defendants, and the Court having reviewed the briefs submitted, being fully advised on the issues, and good cause appearing therefor;

IT IS HEREBY ORDERED as follows:

1. Due to a clerical error of filing the wrong form of the order, this order is entered and filed pursuant to Rule

60(a) of the Hawaii Rules of Civil Procedure and supersedes the Decision, Order On Defendants' Motion to Dismiss Or In The Alternative For Summary Judgment filed herein on June 25, 1990.

2. That Defendants' Motion To Dismiss Or In The Alternative For Summary Judgment is denied.

3. That in the interest of judicial economy, and inasmuch as the legal issues raised may ultimately more speedily terminate this litigation on appeal, it is advisable for the speedy termination of this litigation to permit an interlocutory appeal pursuant to H.R.S. Section 641-1(b).

Accordingly, the Court concludes:

1. Defendants' Motion to Dismiss Or In The Alternative For Summary Judgment is denied with leave to file an interlocutory appeal.

2. All discovery in progress, including Court orders relating to discovery activities, is stayed pending the outcome of any appeal. In the event the appeal is not dispositive, discovery may be resumed. Trial should be set within six months of any disposition on appeal.

DATED: Hilo, Hawaii, JUL 12 1990

/s/ ERNEST KUBOTA [SEAL]
JUDGE OF THE ABOVE-
ENTITLED COURT

APPENDIX "D"

NO. 14621

IN THE SUPREME COURT OF THE STATE OF HAWAII

ROSEMARY SOONG and JAMES SOONG, Plaintiffs-Appellees, vs. THE UNIVERSITY OF HAWAII AT HILO, JOYCE INABA, SHARON HANNAH, GENEVIEVE KINNEY, LARRY TEST, PATRICK W. NAUGHTON, JANICE KIDO, SONJA NOTZ, WINIFRED TATSUTA, JUDITH MILLER, ELEANOR STERLING, JEANETTE JUSTICE, as individuals, Defendants-Appellants, and JOHN DOES 1-100, JANE DOES 1-100, DOE PARTNERSHIPS 1-100, DOE CORPORATIONS 1-100, and DOE LEGAL ENTITIES 1-100, Defendants.	CIV. NO. 88-235 FILED 1991 APR 26 PM 1:59 /s/ Sandra N. Yasui CLERK SUPREME COURT

ORDER DENYING RECONSIDERATION

Appellants' motion for reconsideration filed on April 18, 1991, is hereby denied.

DATED: Honolulu, Hawaii, April 26, 1991.

Charlene M. Aina,
Harriet Yoshida Lewis,
and Steven S. Michaels,
Deputy Attorneys General,
on the motion

/s/ H. Lum

/s/ Frank D. Padgett

/s/ Yoshimi Hayashi

/s/ J. Wakatsuki

/s/ Ronald T. Y. Moon

APPENDIX "E"

NO. 14621

IN THE SUPREME COURT OF THE STATE OF HAWAII

ROSEMARY SOONG and JAMES SOONG, Plaintiffs-Appellees, vs. THE UNIVERSITY OF HAWAII AT HILO, JOYCE INABA, SHARON HANNAH, GENEVIEVE KINNEY, LARRY TEST, PATRICK W. NAUGHTON, JANICE KIDO, SONJA NOTZ, WINIFRED TATSUTA, JUDITH MILLER, ELEANOR STERLING, JEANETTE JUSTICE, as individuals; JOHN DOES 1-100, JANE DOES 1-100, DOE PARTNERSHIPS 1-100, DOE CORPORATIONS 1-100, and DOE LEGAL ENTITIES 1-100, Defendants-Appellants.	) CIV. NO. 88-235)) APPEAL FROM THE DECISION, ORDER ON DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT ENTERED ON JUNE 25, 1990)) THIRD CIRCUIT COURT)) HONORABLE ERNEST KUBOTA Judge)) FILED MAY 16 1991

JUDGMENT ON APPEAL

Pursuant to the memorandum opinion of the Supreme Court entered on April 8, 1991, the Decision, Order on Defendants' Motion to Dismiss or in the Alternative for Summary Judgment of the Circuit Court of the Third Circuit entered on June 25, 1990 is affirmed and remanded with instruction.

DATED: Honolulu, Hawaii, MAY 16 1991.

BY THE COURT:

/s/ Eugene L. Sabado
Clerk

APPROVED:

/s/ Yoshimi Hayashi
Justice [SEAL]

APPENDIX "F"

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

ROSEMARY SOONG and JAMES Y.F. SOONG, Plaintiffs, vs. THE UNIVERSITY OF HAWAII AT HILO; JOYCE INABA, SHARON HANNAH, GENEVIEVE KINNEY, LARRY TEST, PATRICK W. NAUGHTON, JANICE KIDO, SONJA NOTZ, WINIFRED TATSUTA, JUDITH MILLER, ELEANOR STERLING, JEANETTE JUSTICE, as individuals; JOHN DOES 1-100, JANES DOES 1-100, DOE PARTNERSHIPS 1-100, DOE CORPORATIONS 1-100, and DOE LEGAL ENTITIES 1-100, Defendants.	Civil No. 88-235 COMPLAINT; SUMMONS (HILO DIVISION) THIRD CIRCUIT COURT STATE OF HAWAII FILED 1988 JUL 22 PM 3:54 M. TSUJI CLERK

COMPLAINT

Plaintiffs, ROSEMARY SOONG and JAMES Y.F. SOONG, by and through their attorneys, WILLIAM J. ROSDIL, ATTORNEY AT LAW, A LAW CORPORATION, for their claims against Defendants above named, allege as follows:

1. Plaintiff ROSEMARY SOONG, is and at all relevant times herein was a resident of the County and State of Hawaii.

2. Plaintiff JAMES Y.F. SOONG, is and at all relevant times herein was a resident of the County and State of Hawaii.

3. Defendant THE UNIVERSITY OF HAWAII AT HILO is a State chartered institution with its principal place of business in Hilo, County and State of Hawaii and is being sued in compliance with Chapters 304, 661, and 662 of the Hawaii Revised Statutes.

4. Defendants JOYCE INABA, SHARON HANNAH, GENEVIEVE KINNEY, LARRY TEST, PATRICK W. NAUGHTON, JANICE KIDO, SONJA NOTZ, WINIFRED TATSUTA, JUDITH MILLER, ELEANOR STERLING and JEANETTE JUSTICE are and at all relevant times herein were residents of the County and State of Hawaii.

5. Defendants JOHN DOES 1-100, JANE DOES 1-100, DOE PARTNERSHIPS 1-100, DOE CORPORATIONS 1-100, AND DOE LEGAL ENTITIES 1-100 are defendants who, pursuant to Rule 17(d) of the Hawaii Rules of Civil Procedure, are being sued under fictitious names because Plaintiffs have not been able to ascertain their identities despite good faith and reasonably diligent efforts. The interests of said unidentified defendants in this civil action are that they are liable to Plaintiffs for the claims set forth herein, or are the agents, representatives, officers, directors, trustees, employees, or independent contractors of the named defendants or other unidentified defendants herein. Plaintiffs have attempted to

ascertain the identities of said defendants by interviewing available witnesses, and reviewing the relevant reports and documents available to Plaintiffs.

6. All relevant facts herein occurred within the County and State of Hawaii.

7. In the fall of 1986, Plaintiff ROSEMARY SOONG, (hereinafter referred to as "ROSEMARY"), was properly enrolled in the University of Hawaii's Hilo campus, also known as THE UNIVERSITY OF HAWAII AT HILO (hereinafter referred to as "UNIVERSITY").

8. Rosemary's personal goal was to pursue a career in the nursing profession.

9. Rosemary was employed as a Paramedical Assistant for the State of Hawaii's Public Health Nursing's Case Management Coordination Program for the frail elderly from July 1985 to March 1986. Rosemary resigned to pursue her degree in nursing.

10. In preparing herself for a nursing career, Rosemary acquired several health care certificates including: (1) University of Hawaii Certificate for First Responder Training; (2) University of Hawaii Certificate for Dynamics of Child Abuse and Neglect; (3) University of Hawaii Certificate for Identifying, Assessing and Using Support Networks for the Older Adult and Family Caregivers; and (4) The Hawaii Heart Association's Certificate for Stroke Rehabilitation.

11. Just prior to entering the University's Practical Nursing Program in the fall of 1986, Rosemary applied for and received a scholarship from the Zonta Club to pursue her nursing career. A counselor for the University

supported Rosemary's scholarship application with a recommendation that stated in part:

> Without exception, Rosemary is the most determined and persistent student I have had. Rosemary has experienced separation from her family, deprivation of personal goals and pleasures in order for her to achieve her education and professional goals. She has made and is willing to make personal sacrifices now in order for her to achieve her ultimate goal. Her academic, personal and professional records speak for themselves.
>
> I have no doubt that she will accomplish this first step in obtaining her LPN in the very near future.

12. In the 1986 Fall semester, Rosemary was registered in the University's Practical Nursing Program, (which was affiliated and/or connected to the Hawaii Community College), and enrolled in the thirteen (13) credit course generally called Nursing 20.

13. In the 1986 Fall semester, the University's instructors for Nursing 20 were SHARON HANNAH and JOYCE INABA.

14. Rosemary received a final course grade of "B" for the University's Fall 1986 Nursing 20 course.

15. In the 1987 Spring semester, Rosemary was enrolled in the University's fourteen (14) credit course generally called Nursing 22.

16. The University's instructors for the Spring semester Nursing 22 course were SHARON HANNAH, (hereinafter referred to as "HANNAH") and JOYCE INABA, (hereinafter referred to as "INABA").

17. The University's Nursing 22 course consisted primarily of lectures and clinical work together with weekly examinations and occasional quizzes.

18. The clinical portion of Nursing 22 also involved student preparation and submittal of "NURSING CARE PLANS", (hereinafter referred to as "NCP"). The previous semester course of Nursing 20 also required the successful completion of NCP.

19. For the time Rosemary was enrolled in the University's Nursing 22 course, her weekly examination score averaged approximately 74.5%. Also, for the first half of the 1987 semester, Rosemary received approximately a 78% average on her NCP, graded by Hannah. A 70%, or "C" grade average, was required to remain in the nursing program.

20. On or about March 18, 1987, Rosemary sought the tutorial assistance of a fellow classmate, KATIE OMIJA, in preparing her NCP. At this halfway point of the semester, the clinical rotation schedule with instructor Inaba began.

21. On or about March 20, 1987, Rosemary submitted her first set of NCP to Inaba.

22. On or about March 30, 1987, Inaba returned Rosemary's NCP with no grade except for comments, in large bold print, such as "Rosey – I'm not going to grade this NCP. It's so far out of whack! You best get it together FAST!"

23. Rosemary met with Inaba after receiving her ungraded NCP, but Inaba could not state what problems Rosemary had with the NCP. Instead, Inaba suggested

Rosemary take remedial English courses and referred her to fellow student KATIE OMIJA, (hereinafter referred to as "OMIJA"), and University Instructor ELEANOR STERLING, (hereinafter referred to as "STERLING"), for assistance.

24. After this session with Inaba, Rosemary sought the help of Omija and Sterling to help her with her NCP. Rosemary later sought the help of fellow classmate PAULETTE VALENTIN, (hereinafter referred to as "VALENTIN"), because Omija felt uncomfortable assisting Rosemary since Rosemary received poor grading from Inaba with Omija's help.

25. On or about April 9, 1987, Inaba subjected Rosemary to severe criticism in front of the hospital staff and her fellow students. Rosemary also submitted her second set of NCP to Inaba.

26. On or about April 13, 1987, Rosemary received her second set of NCP graded by Inaba with failing scores.

27. On or about April 15, 1987, Rosemary continued to seek help from Valentin in preparing her NCP.

28. On or about April 16, 1987, Inaba interrogated and harassed Rosemary in the Hilo Hospital medication storeroom.

29. On or about April 17, 1987, Rosemary submitted her third set of NCP to Inaba.

30. The people who assisted Rosemary in her NCP, including fellow student tutors, could not understand why Inaba had been giving failing grades to Rosemary's

NCP since everything appeared to be in order except for occasional grammatical errors.

31. In the Nursing 22 Course, the grades given for the NCP constituted only a small portion of the overall grade for the class.

32. On or about April 20, 1987, Inaba returned Rosemary's NCP without grading them. Rosemary went to see the University's Director of Nursing, GENEVIEVE KINNEY, to ask for her assistance to get Inaba to grade her NCP so she could correct her mistakes.

33. Rosemary subsequently met with Inaba who informed Rosemary that she should voluntarily withdraw from the Practical Nursing Program. Inaba threatened to give Rosemary fourteen failing grades if she did not withdraw from the program.

34. Inaba stated to Rosemary that because Rosemary could not write she needed to withdraw.

35. On or about April 21, 1987, Rosemary checked and ascertained that her NCP had still not been graded by Inaba.

36. On or about April 22, 1987, Rosemary again went to see Inaba about her NCP only to be handed a "REQUEST FOR STUDENT WITHDRAWAL" with a remark by Inaba that it was "hot off the presses." The document was signed by Hannah and Inaba. After reviewing the document and addressing questions, Inaba told Rosemary that Hannah had mentioned to her that Rosemary was doing well in the program.

37. The "REQUEST FOR STUDENT WITHDRAWAL" submitted to Rosemary was the first time

during the 1986 Fall and 1987 Spring semester that Rosemary was informed of deficiencies in her clinical performance and NCP which could lead to her dismissal from the Practical Nursing Program. Rosemary was forced to withdraw three weeks before final examinations.

38. Before Rosemary left the meeting with Inaba and Hannah, Inaba mentioned to Rosemary that she should not show her NCP to anyone.

39. Despite Rosemary's disagreement with some of the stated reasons on the prepared "REQUEST FOR STUDENT WITHDRAWAL", Rosemary signed the document in fear of the more serious consequence threatened previously by Inaba of failing the course.

40. Thereafter, Rosemary met with the University's "exiting" counselor, LARRY TEST, (hereinafter referred to as "TEST") requesting his approval for withdrawal from the nursing program. Test checked with Inaba and came back to tell Rosemary that Inaba felt she was having writing problems. Test suggested remedial English courses to improve Rosemary's chances of re-admission.

41. Rosemary also mentioned to Test that she was considering filing a formal grievance against the nursing program, to which Test replied, if he were her he would not file a grievance if Rosemary had intentions of getting back into the Nursing Program.

42. Thereafter, Rosemary met with a University professor, PATRICK W. NAUGHTON, (hereinafter referred to as "NAUGHTON"), to secure his approval for withdrawal. Rosemary told Naughton she was requested to withdraw because Inaba found her NCP unacceptable.

43. Naughton stated to Rosemary that he would talk to Inaba and investigate the situation and further requested that Rosemary leave her NCP with him.

44. Rosemary then saw University counselor JAMES MIMAKI who, upon listening to the circumstances surrounding Rosemary's withdrawal, stated he did not feel "this was right" and further asked Rosemary whether she was planning to file a grievance against the nursing program and that he would support Rosemary if she decided to submit a grievance.

45. On or about April 24, 1987, Rosemary went to Naughton's office only to be told he was out of town until the following week whereupon Rosemary requested a member of Naughton's staff to retrieve Rosemary's NCP for Rosemary's safekeeping.

46. On or about April 27, 1987, Rosemary met with Naughton to ascertain her withdrawal status whereupon Naughton told Rosemary he had taken her NCP home to review but had not spoken to Inaba.

47. Rosemary told Naughton that he did not have her NCP since she asked his staff to give them back to her whereupon Naughton became visibly upset and corrected himself saying he thought he took Rosemary's NCP home.

48. Naughton then told Rosemary he did not want to be "the bad guy" to tell Rosemary to file a grievance against the nursing program. Naughton admitted to Rosemary that the nursing program has had problems and that it needed to be resolved.

49. On or about May 5, 1987, Rosemary met with the University's Chairperson of the General Education and Public Services Division, JANICE KIDO, (hereinafter referred to as "KIDO"), and told Kido Inaba had been treating her unfairly.

50. On or about May 15, 1987, Rosemary submitted a written grievance against Inaba and the Nursing Program to Kido.

51. On or about May 21, 1987, Kido submitted a response to Rosemary's grievance petition generally stating that Inaba had not treated Rosemary unfairly.

52. On or about May 26, 1987, Rosemary submitted a written grievance against Inaba and the Nursing Program to Naughton who then happened to be the University's Acting Provost of the College of Arts and Sciences. At first, Naughton refused to receive Rosemary's grievance unless it was accompanied by an explanatory letter.

53. Upon submitting her grievance petition to Naughton, Rosemary planned to meet with Naughton together with JOSEPH HALBIG, a Professor at the University, as her witness. Naughton refused to discuss Rosemary's situation with JOSEPH HALBIG present.

54. On or about June 8, 1987, Naughton submitted his response to Rosemary's grievance petition stating that Rosemary's grievance against Inaba and the nursing program had no merit.

55. On or about June 17, 1987, the law firm of KOBAYASHI, WATANABE, SUGITA, KAWASHIMA AND GODA filed on behalf of Rosemary, a written appeal of

Naughton's decision to the University's Academic Grievance Committee stating that Rosemary had been unfairly treated by Inaba and the nursing program. More specifically, the appeal noted that Inaba had unfairly graded Rosemary's NCP despite successfully completing NCP in the first half of the semester graded by Hannah. Secondly, the appeal stated that Rosemary was unfairly notified of her supposed deficiencies for the first time shortly before final examinations.

56. On or about December 29, 1987, the University's Chairperson of the Academic Grievance Committee, PHYLLIS AHMADIA, agreed to (1) re-admit Rosemary into the Practical Nursing Program and (2) waive Rosemary's tuition for the 1988 Spring and Summer sessions in the Practical Nursing Program. In exchange, Rosemary agreed to postpone a hearing on her grievance to the University's Academic Grievance Committee.

57. It was also agreed between Rosemary and the University that Rosemary's indefinite postponement of her academic grievance would not waive any claims, causes of action, remedies or affirmative defenses that Rosemary may have against the University, or a renewal of her academic grievance after August 1, 1988.

58. To improve her alleged writing deficiencies, Rosemary enrolled and successfully completed an English Composition course at the University in the 1987 Fall semester.

59. On or about January 8, 1988, Rosemary officially registered in the University's Practical Nursing Program and enrolled in the Nursing 22 course which she was forced to withdraw from in the 1987 Spring semester.

60. Hannah and SONJA NOTZ, (hereinafter referred to as "NOTZ") were the instructors for the University's Nursing 22 course in the 1988 Spring semester.

61. On or about February 8, 1988, Notz presented a list of approximately thirty four (34) items to Rosemary detailing alleged deficiencies in Rosemary's clinical performance in the 1988 Spring semester.

62. On or about February 8, 1988, Rosemary was place on "Probationary Status" by Notz and Hannah and handed a memorandum listing thirteen items which Rosemary was to abide by in her probationary status.

63. On or about February 12, 1988, Notz drafted a memorandum to Rosemary detailing her alleged deficiencies in accordance to the thirteen point probationary status memorandum. The February 12, 1988 memorandum also contained a "Special Note" which indicated that a hospital staff person relayed to Notz that Rosemary had a "very big mouth".

64. On or about February 16, 1988, Rosemary submitted a point by point response to Notz's February 12, 1988 memorandum and concluded she only wanted to finish the nursing program without unfair prejudice because of her previous filing of a grievance against the Practical Nursing Program.

65. On or about February 17, 1988, the University's Admissions and Progression Committee recommended that Rosemary be dropped from the nursing program. The recommendation was made by several University instructors which included GENEVIEVE KINNEY,

SHARON HANNAH and LARRY TEST, who were previously involved in Rosemary's 1987 forced withdrawal from the Practical Nursing Program.

66. By the end of February of 1988, Rosemary was forced to withdraw from all of her nursing courses for the University's 1988 Spring semester and from the Practical Nursing Program.

COUNT I

67. Plaintiffs reallege and incorporate herein by reference paragraphs 1 through 66 of the Complaint.

68. By the act of matriculation between Rosemary and the University, together with Rosemary's payment of tuition and fees, a valid contract existed between Rosemary and the University.

69. The contract between Rosemary and the University was embodied in several writings, including, but not limited to the University's "Student Academic Rights", the "Student Academic Expectations", and the Practical Nursing Department's "Agreement For Learning Between Students and Faculty".

The "Student Academic Rights" states in relevant part:

> B. Students shall have protection against prejudiced or capricious academic evaluation. Student performance shall be evaluated solely on an academic basis and not on opinions or conduct in matters unrelated to academic standards.
>
> A. Students shall be free to take reasoned exception to the data or views offered in any

course of study and to reserve judgment about matters of opinion.

The "Student Academic Expectations" states in relevant part that students have the right:

> 8. To receive equitable and unbiased treatment within a classroom environment conducive to learning.
>
> 7. To receive fair and objective evaluations of their coursework at appropriate times during the semester, including at least one evaluation prior to the last date of course withdrawal.
>
> 12. To be free from interference by faculty members or administrators to pursue an academic complaint or grievance, and to be protected against any punitive action because a complaint or grievance was filed.

The "Agreement For Learning Between Students And Faculty" states that the student can expect the faculty to do the following:

> 1. Be patient and understanding.
>
> 2. Be honest and impartial in evaluating and grading student performance.
>
> 3. Suggest ways to improve if student is having difficulty.
>
> 4. Inform student if performance is not up to expectations.
>
> 8. Offer constructive critism. [sic]
>
> 9. Provide individual help when requested.

The above-mentioned writings were supplemented by other written and oral commitments by the University and/or its agents, representatives, instructors, professors,

officers, directors, trustees, employees, and independent contractors (hereinafter referred to collectively as the "THE UNIVERSITY"), all of which became part of the total agreement.

70. The University's actions to force Rosemary to withdraw from the Nursing 22 course and the Practical Nursing Program was made prejudicially, capriciously, and arbitrarily, thereby breaching Rosemary's contract with the University.

71. The University operated the Practical Nursing Program and the Nursing 22 course in a biased, inequitable, and discriminatory manner giving certain students special treatment and an unfair advantage over Rosemary, thereby materially breaching Rosemary's contract with the University.

72. The University also breached its contract with Rosemary by perpetuating an oppressive and retaliatory punitive act against Rosemary by forcing her to withdraw from the Practical Nursing Program in the 1988 Spring semester because Rosemary previously filed an academic grievance against the Practical Nursing Program in 1987.

73. The University further breached its contract with Rosemary by grading her performance in a biased, unfair, prejudiced, capricious and/or discriminatory manner and instead evaluated her according to matters unrelated to academic standards.

74. The University further breached its contract with Rosemary by not suggesting ways for her to improve when she was alleged to have difficulty.

75. The University's breach of Rosemary's contract was done wantonly and/or recklessly and/or maliciously and/or with retaliatory intent.

76. As a result of the University's breach of contract, Rosemary suffers and continues to suffer loss of her professional opportunity and career, loss of future wages, earnings, and benefits, and future expenses to enroll in another college/university and/or career and educational pursuit. Rosemary also suffers severe emotional distress and disappointment as a result of the University's breach of contract. Likewise, the University's breach of contract inflicted severe emotional distress, disappointment, and pecuniary loss to Rosemary's then husband, Plaintiff JAMES Y.F. SOONG. The total amount of damages caused by the University's breach is to be proven at trial.

COUNT II.

77. Plaintiffs reallege and incorporate herein by reference paragraphs 1 through 76 of the Complaint.

78. From the totality of the circumstances, there existed an implied contract between Rosemary and the University whereby Rosemary would not be subject to arbitrary dismissal and/or arbitrarily forced to withdraw from any course or the Practical Nursing Program.

79. The University breached its implied contract with Rosemary by arbitrarily forcing her to withdraw from the Nursing Program in both the 1987 and 1988 Spring semesters.

80. The University further breached the contract by forcing Rosemary to withdraw from the Nursing Program in 1988 in retaliation for Rosemary's academic grievance filed against the Nursing Program in 1987.

81. The University's breach of Rosemary's implied contract was done wantonly and/or recklessly and/or maliciously and/or with retaliatory intent.

82. As a result of the University's breach of Rosemary's contract, Rosemary suffers and continues to suffer loss of her professional opportunity and career, loss of future wages, earnings, and benefits, and future expenses to enroll in another college/university and/or career and educational pursuit. Rosemary also suffers severe emotional distress and disappointment as a result of the University's breach of contract. Likewise, the University's breach of Rosemary's contract inflicted severe emotional distress, disappointment and pecuniary loss to Rosemary's then husband, Plaintiff JAMES Y.F. SOONG. The total amount of damages caused by the University's breach is to be proven at trial.

COUNT III.

83. Plaintiffs reallege and incorporate herein by reference paragraphs 1 through 82 of the complaint.

84. The conduct of the University in the academic evaluation and/or investigation, and/or their forced withdrawal of Rosemary from the Nursing Program was negligent.

85. As a result of the University's negligent conduct, Rosemary suffered severe mental and emotional

distress. Therefore, Rosemary is entitled to recover damages against the University in an amount to be proven at trial.

COUNT IV.

86. Plaintiffs reallege and incorporate herein by reference paragraphs 1 through 85 of the complaint.

87. Given the relationship between Rosemary and the University, coupled with the University's position of power and authority to affect Rosemary's interests and future career, the University's conduct in forcing Rosemary to withdraw from the Nursing Program and/or its retaliatory act of forcing Rosemary to withdraw because she previously filed an academic grievance against the University, and/or the University's conduct in essentially telling Rosemary she had a "big mouth" knowing Rosemary was already mentally and emotionally sensitive due to the fact the University referred Rosemary to a mental health counselor, constitutes extreme and outrageous conduct, resulting in an intentional infliction of severe emotional and mental distress. Therefore, Rosemary is entitled to recover damages in an amount to be proven at trial.

COUNT V.

88. Plaintiffs reallege and incorporate herein by reference paragraph [sic] 1 through 87 of the complaint.

89. The University's conduct during Rosemary's tenure in the Practical Nursing Program violated public

policy and the University's own guidelines in the Practical Nursing Program, which Rosemary reasonably relied upon. Therefore, the University is promissorily estopped from claiming no contract existed between itself and Rosemary according to the writings and representations made to Rosemary in entering the Practical Nursing Program.

90. The University's Practical Nursing Program "Statement of Philosophy" states in part:

> Students in practical nursing are of varying cultural and educational backgrounds. We believe that each student is unique in his/her ability to learn and in his/her rate of learning. The education of the practical nurse includes knowledge of fundamental principles of human behavior so the practitioner may better understand and assist individuals under stress. An educational environment which is flexible and permissive is maintained to foster independence and adaptability to change. Learning is facilitated by involving each student in a variety of activities which stimulate thinking, encourage refinement of motor skills, and help to shape their attitudes and outlook. Faculty and students share the responsibility for the learning that takes place. Each understands what is expected of the other and willingly helps the other so that learning is maximized. Students are encouraged to develop to their fullest potential and curriculum prepares the graduate to perform those functions which are congruent within the limitations of the vocational and educational preparation.

91. The University violated its contract with Rosemary as evidenced by the Practical Nursing Program's "Statement of Philosphy" and the writings as stated

herein in Count I by forcing Rosemary to withdraw from the Practical Nursing Program in 1987 and 1988 and or its punitive retaliatory act of forcing Rosemary to withdraw in 1988.

92. As a result of the University's breach of contract, Rosemary suffers and continues to suffer loss of her professional opportunity and career, loss of future wages, earnings, and benefits, and future expenses to enroll in another college/university and/or career or educational pursuit. Rosemary also suffers severe emotional distress and disappointment as a result of the University's breach of contract. Likewise, the University's breach of contract has inflicted severe emotional distress, disappointment, and pecuniary loss on Rosemary's then husband, JAMES Y.F. SOONG. The total amount of damages caused by the University's breach of contract is to be proven at trial.

COUNT VI.

93. Plaintiffs reallege and incorporate herein by reference paragraphs 1 through 92 of the complaint.

94. Rosemary brings a cause of action, pursuant to 42 United States Code, Section 1983, against the following Defendants, JOYCE INABA, SHARON HANNAH, GENEVIEVE KINNEY, LARRY TEST, PATRICK W. NAUGHTON, JANICE KIDO, SONJA NOTZ, WINIFRED TATSUTA, JUDITH MILLER, ELEANOR STERLING and JEANETTE JUSTICE, (hereinafter referred to in this count as "DEFENDANTS"), individually as instructors, professors, counselors, agents, representatives, officers, directors, trustees, employees and/or independent contractors of the University.

95. Defendants violated Rosemary's substantive due process right guaranteed and protected under the Fourteenth Amendment of the United States Constitution by arbitrarily, and/or capriciously, and/or in bad faith, forcing Rosemary to withdraw and/or dismissing Rosemary from the University's Practical Nursing Program for which she had a constitutionally protected property right in.

96. Defendants, individually and/or in concert with one another acted under color of a statute, ordinance, regulation, and/or custom or usage of the State of Hawaii in causing the above mentioned deprivation of Rosemary's Constitutional Rights.

97. As a result of Defendants' conduct depriving Rosemary of her rights protected under the Fourteenth Amendment of the United States Constitution, Rosemary is entitled to recover special, general, and punitive damages against the Defendants pursuant to 42 United States Code, Section 1983 and which is to be proven at trial.

WHEREFORE, Plaintiffs pray for Judgment against all Defendants named herein as follows:

1. Special damages in such amounts as shall be shown at trial, including, but not limited to damages for loss of professional opportunity and career, loss of future wages, earnings and benefits, and future expenses to enroll in another college/university and/or career and educational pursuit.

2. General damages in the amount to be proven at trial.

3. Punitive damages, except as against the University of Hawaii at Hilo as a corporate entity, in an amount to be proven at trial.

4. An award of Plaintiffs' attorney's fees and costs incurred in connection with this action.

5. Any and all other just relief as this Court deems proper.

DATED: Hilo, Hawaii, July 20, 1988.

WILLIAM J. ROSDIL, ATTORNEY
AT LAW, A LAW CORPORATION

/s/ W.J. Rosdil

APPENDIX "G"

The federal question of whether Petitioners should have been dismissed from the case under the doctrine of qualified immunity because there was no clearly established substantive due process right not to be arbitrarily dismissed from a University Program was raised in the State Circuit Court in the memoranda in support of Defendants' Motion to Dismiss or in the alternative for Summary Judgment, as follows:

> Plaintiff Rosemary Soong contends that she has a property right protected by the Due Process Clause in continued enrollment in the Practical Nursing program. She claims that she was deprived of this right without due process because the University of Hawaii at Hilo requested her withdrawal and/or dismissal from the program.
>
> Based upon *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), no property right in continued enrollment is recognized. The court in *Ewing*, which had a factual situation similar to the instant case, stated that the existence of a constitutionally protected right in continued enrollment is doubtful because there is no provision in the Constitution for such a right. See footnote 7, *Ewing*, [474 U.S. at 222]. This point is affirmed by Justice Powell in his concurring opinion. [474 U.S. at 228-30]. Moreover, as Justice Powell reasoned, citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), not every property right is entitled to the protection of substantive due process because these rights are created only by the Constitution, and he concludes that continued enrollment is not considered to be as important as other rights for which the Court has accorded the protection of substantive due process. [474 U.S. at 229-30.]

> Therefore, it clearly appears that without establishing entitlement to a property right, there can be no violation of plaintiffs' substantive due process rights by Defendants' requested withdrawal and subsequent dismissal of plaintiff Rosemary Soong from the Practical Nursing Program.
>
> . . . .
>
> The doctrine of qualified immunity precludes plaintiffs' claims for damages against the individual defendants in their individual capacities. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Under the *Harlow* test, which would be applied at the summary judgment stage, public officials are immune from damages unless it can be shown that their conduct violated clearly established constitutional rights of which a reasonable person would have known. . . . In this case plaintiffs have failed to identify what particular constitutional right has been violated by Defendants or what fundamental right Plaintiffs have been deprived of by Defendants. As discussed above, there is no constitutional right to continued enrollment.
>
> In *Anderson v. Creighton*, 483 U.S. [635] (1987), the court clarified its view on qualified immunity by stating that the trial court must answer the objective question of whether a reasonable public official could have believed he was violating a clearly established right of the plaintiff. . . . .
>
> . . . Plaintiffs have failed to show any act by the individual defendants which violated Rosemary Soong's constitutional rights.

Memorandum in Support of Defendants' Motion to Dismiss or in the Alternative for Summary Judgment, filed March 22, 1990 in the Circuit Court of the Third Circuit,

State of Hawaii (Civil No. 88-235), at pp. 13-14, 19-20 (parallel cites omitted).

> Plaintiffs continue to argue that Rosemary Soong has a property right in continued enrollment. This is erroneous. There is no legal basis to support this proposition. We challenge both the adequacy of plaintiffs' allegation and the sufficiency of this element of their § 1983 cause of action. A careful reading of *Ewing* reveals that no constitutional right exists. However, the *Ewing* court *assumed* a constitutional right existed. . . . .
>
> . . . Therefore, all individual defendants [] are entitled to a dismissal or summary judgment based upon qualified immunity. [Plaintiffs] fail[ed] to articulate a protected right under any provision of the Constitution.

Defendants' Supplemental Memorandum in Support of Their Motion to Dismiss or in the Alternative for Summary Judgment, filed April 11, 1990 in the Circuit Court of the Third Circuit, State of Hawaii (Civil No. 88-235), at pp. 5-6.

APPENDIX "H"

The federal question of whether Petitioners should have been dismissed from the case under the doctrine of qualified immunity because there was no clearly established substantive due process right not to be arbitrarily dismissed from a University Program was raised in the State Supreme Court in Defendants-Appellants' Opening and Reply Briefs as follows:

III. STATEMENT OF POINTS ON APPEAL

> The lower court committed error in denying Defendants' Motion to Dismiss or In The Alternative For Summary Judgment and refusing to determine that:
>
> . . . .
>
> 3. Count VI (cause of action based upon the Fourteenth Amendment due process clause and asserted under 42 U.S.C. § 1983) fails to state a claim against the individual defendants in their personal capacities upon which relief can be granted.
>
> 4. Even if Plaintiffs properly are entitled to bring this action, . . . all . . . defendants sued in their individual capacities are immune from their claims on the basis of qualified official immunity.
>
> . . . .

V. QUESTIONS PRESENTED

> . . . .
>
> 4. Whether a student with academic deficiencies has a constitutionally protected right to continued enrollment in UH Hilo.

5. Whether UH Hilo employees are immune from liability for damages sought under 42 U.S.C. § 1983 for the exercise of their official functions absent a clear showing of a violation of a clearly established constitutional right of which a reasonable person would know.

VI. ARGUMENT

. . . .

E. THE DENIAL OF DEFENDANTS' MOTION TO DISMISS THE CLAIMS AGAINST THE ELEVEN INDIVIDUAL DEFENDANTS WAS ERRONEOUS WHEN THE COMPLAINT FAILS TO STATE A CLAIM FOR RELIEF UNDER 42 U.S.C. § 1983.

Plaintiff Rosemary Soong contends that she has a property right, protected by the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution, in continued enrollment in the Practical Nursing Program. Rosemary claims that she was deprived of this property right without due process because her instructors and academic administrators at UH Hilo requested her withdrawal from the program. Plaintiffs seek a remedy against the individual defendants pursuant to 42 U.S.C. § 1983.

. . . .

In *Ewing*, which dealt with a factual situation similar to the instant case, the Court declined to " 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,' " 474 U.S. at 222 (citations omitted), in deciding whether Ewing had a protected property right in continued enrollment. Instead, at the invitation of the University of Michigan, the court assumed the existence of a constitutionally protectible property

right in Ewing's continued enrollment, *Ewing*, 474 U.S. at 223. *See* footnote 7, 474 U.S. at 222. However, Justice Powell, in his concurring opinion in *Ewing* doubting the very existence of a property right in continued enrollment protected by substantive due process stated: "It bears little resemblance to the fundamental interests that previously have been viewed as implicity [sic] protected by the Constitution." 474 U.S. at 229-30.

. . . .

There is no Hawaii state law that establishes or grants to a student an enforceable expectation of continued enrollment in the Practical Nursing Program of Hawaii Community College, or in any academic program of a public educational institution. . . . .

Without a property interest, Plaintiffs have no basis to invoke the due process clause. Without a violation of the due process clause or any other provision of the federal constitution, there can be no cause of action under 42 U.S.C. § 1983.

F. PLAINTIFFS' CLAIMS ASSERTED AGAINST THE ELEVEN INDIVIDUAL DEFENDANTS UNDER 42 U.S.C. § 1983 ARE BARRED BY THE DOCTRINE OF QUALIFIED IMMUNITY.

Even if Rosemary could persuade this Court to find the requisite property right for her due process claim as a matter of first impression, the doctrine of qualified immunity bars Plaintiffs' 42 U.S.C. § 1983 claims for damages against the individual defendants in their individual capacities. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Under the *Harlow* test, which would be applied at the summary judgment stage, public

> officials are subject to suits for damages under 42 U.S.C. § 1983 only if their conduct violated clearly established constitutional rights of which a reasonable person would have known. *See also Davis v. Scherer*, 468 U.S. 183, reh. denied, 468 U.S. 1226 (1984) (qualified immunity under § 1983 available even when state officials violated state law.)
>
> . . . .
>
> In the instant case Plaintiffs have failed to establish the existence of a clearly established constitutional right which has been violated by the eleven individual defendants. Plaintiffs fail to demonstrate any constitutional right that has been deprived by Defendants. As discussed in detail above, Rosemary does not have a constitutionally protected property right to continued enrollment in the Practical Nursing Program. Plaintiffs have not been deprived of any federal right by the eleven individual defendants. Plaintiffs fail to show any deprivation under the Fourteenth Amendment and fail to state a claim for relief under 42 U.S.C. § 1983.

Defendants-Appellants' Opening Brief filed October 1, 1990 in the Supreme Court of the State of Hawaii (No. 14621), at pp. 5-7, 19-23 (record references and parallel citations omitted).

II. ARGUMENT

. . . .

B. PLAINTIFFS FAIL TO STATE A CAUSE OF ACTION UNDER 42 U.S.C. § 1983.

Plaintiffs assert that their 42 U.S.C. § 1983 cause of action is based upon a due process

violation under the Fourteenth Amendment of the United States Constitution. Plaintiffs claim that Rosemary has a constitutionally protected property right in her continued enrollment in the nursing program.

Ewing is a due process case that addressed, without deciding, the issue of whether a student has a constitutionally protected property right in continued enrollment. The *Ewing* court assumed, for purposes of that case, that a property right existed because of the University of Michigan admitted in the answer to the complaint that under Michigan law the student may have enjoyed a property right in continued enrollment in the educational program. *Ewing*, 474 U.S. at 222-23, n. 7 and 8. Justice Powell, in his concurring opinion, disagreed with the majority's assumption of the existence of a property right. Justice Powell observed that "[a]s the Court [majority decision] correctly points out, respondent's [student's] claim to a property right is dubious at best," and noted that although Michigan may have labeled the interest in continued enrollment to be "property", it is not an interest that rises to the level of a fundamental interest that is viewed to be protected by the Constitution. *Id.* at 229.

Plaintiffs themselves agree in their Answering Brief at 26 that no Hawaii appellate decision has found the existence of a property right in continued enrollment at the University. Without establishing the existence of a constitutionally protected property right, Plaintiffs cannot establish a due process violation under the Fourteenth Amendment and thus cannot state a cause of action under 42 U.S.C. §1983.

C. THE DOCTRINE OF QUALIFIED IMMUNITY CLEARLY BARS THE CLAIMS AGAINST THE ELEVEN INDIVIDUAL DEFENDANTS

Plaintiffs' claims against the eleven individual defendants are based solely upon 42 U.S.C. §1983. It is clearly established that public officials are subject to suit in their individual capacity under 42 U.S.C. §1983 only if their conduct violated clearly established constitutional rights of which a reasonable person would have known. *Harlow v. Fitzerald*, 457 U.S. 800, at 815-19 (1982); *Anderson v. Creighton*, 483 U.S. 635, at 638-40 (1987); *Makanui v. Department of Education*, 6 Haw. App. 397, at 406-07 (1986).

. . . .

Plaintiffs herein have not established the existence of a clearly established constitutional right, which has been violated by the eleven individual defendants. In fact Plaintiffs readily agree in their Answering Brief at 26 that "no Hawaii appellate decision has held that continued enrollment free from arbitrary and bad faith dismissal is a property right." Having thus conceded that there is no such clearly established constitutional right, Plaintiffs' argument that the doctrine of qualified immunity does not apply is without merit.

Defendants-Appellants' Reply Brief filed November 26, 1990 in the Supreme Court of the State of Hawaii (No. 14621), at pp. 6-9 (footnotes omitted).

APPENDIX "I"

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

ROSEMARY SOONG and JAMES Y. F. SOONG,	)	Civil No. 88-235
Plaintiffs,	)	AFFIDAVIT OF ROSEMARY K. BURNETT
vs.	)	
THE UNIVERSITY OF HAWAII AT HILO, et al.,	)	
Defendants.	)	

AFFIDAVIT OF ROSEMARY K. BURNETT

STATE OF HAWAII)
) SS:
COUNTY OF HAWAII)

ROSEMARY K. BURNETT, being first duly sworn on oath, deposes and says:

1. Unless otherwise indicated, the statements herein are based on my personal knowledge and I would be competent to testify thereto.

2. I have been retained by Plaintiffs' attorney as an expert to evaluate Rosemary Soong's performance in the University of Hawaii/Hawaii Community College Practical Nursing Program and to make a determination whether the University and its instructors properly dismissed her for academic reasons.

3. Attached to my affidavit is a true and correct copy of my resume recording my educational and professional experience in the field of nursing and in teaching nursing students.

4. Attached to my affidavit is a true and correct copy of the report, dated October 22, 1989, which I have written for this case.

5. Additional materials are still being produced by the Defendants, and as I review new material, my report may be revised. Of particular importance is the deposition of Sonja Notz, the instructor for Rosemary Soong in the Spring 1988 semester.

AND FURTHER YOUR AFFIANT SAYETH NAUGHT.

/s/ Rosemary K. Burnett
ROSEMARY K. BURNETT

Subscribed and sworn to before me this

3rd day of April, 1990.

/s/ Andrea D. Adrian/L.S.
Notary Public, State of Hawaii

My Commission expires: 3/26/94

RESUME

Rosemary K. Burnett
P.O. Box 1304
Hilo, HI 96721

EDUCATION:

1976	Pepperdine University California Master's of Arts in Education
1967	University of Hawaii at Manoa Honolulu, HI B.S. in Professional Nursing
1963	St. Andrews' Priory Honolulu, HI

RELATED EMPLOYMENT HISTORY:

1989	Sabbatical Leave – graduate student at UH Manoa
Feb to June	CCP Technical Assistant and Training Agent to State Dept of Corrections
March to Dec	Curriculum Specialist: UHM/ Sheraton Hotels Workplace Literacy Project (SELPH)
Aug to Dec	Lecturer – Allied Health Dept – Kapiolani CC
1976 to 1989	University of HI at Hilo/Hawaii Community College 3/86 to 12/88 JTPA Coordinator HVEAP Coordinator Kulani CF Education Coordinator

	9/82 to 2/86	Instructor – Nursing Programs
	8/80 to 8/82	Director of Nursing Programs
	4/80 to 7/80	Acting Director of Nursing Prog.
	1/77 to 3/80	Instructor – Nursing Programs
1973 to 1976	Kapiolana Community College Honolulu, HI	
	9/73 to 7/76	Instructor – Practical Nursing
1971 to 1973	Hawaii Medical Association – Emergency Med. Serv. Program Honolulu, HI	
	11/72 to 5/73	Administrative Asst./Instructor City & County of Honolulu, Health Department – Emergency Medical Services Program Honolulu, HI
	10/71 to 10/72	Supervisor/ Instructor
1967 to 1971	Kuakini Hospital Honolulu, HI	
	5/71 to 9/71	Inservice Instructor

Children's Hospital Honolulu, HI
2/68 to 5/71 Staff RN

University Hospitals of Cleveland
Cleveland, Ohio
7/67 to 1/68 Staff RN

OTHER CERTIFICATION:

May 1987 to present	Comprehensive Competencies Program Technical Assist. and Training Agent, US BASICS, Washington, DC (CCP)

RELATED INFORMATION:

1989	InterPacific Foundation Associate Fellow
1987 - 1988	Hawaii CC Staff Development Committee member
1986 - 1987	First Lady's Outstanding Volunteer Awards Committee Hawaii County Committee member
1988	First Lady's Outstanding Volunteer Awards Committee Hawaii County Chair
1986 - 1988	St. Joseph's School Long Range Planning Committee Curriculum Committee Chair School Board member
- 1986 to present	UHH Committee of Faculty of Hawaiian Ancestry member
1987 - 1989	State HVA Vice-President, Legislative Affairs
1978 to present	Hawaii Vocational Association member

1980 to present	HVA Advisory Board member
1982 to present	HVA Scholarship Committee Chair
1983 – 1984	Division Personnel Committee member
1984 – 1985	Division Personnel Committee chair
1982 – 1986	Faculty Senate Division representative
1984 – 1985	Faculty Senate Curriculum committee chair
1985 – 1986	Community College System AS/AA Task Force representative
1983	Frances Davis Award Recipient
1984	Frances Davis Award Committee member
1985	Co-chair Frances Davis Award Committee
1983 to present	UH Tenure & Promotion Review Committee
1980 – 1982	Hawaii CC Faculty Senate Chair
1978 – 1986	Member of Mental Health Association in Hawaii County
1978 to 1982	Board of Directors and officer

Rosemary K. Burnett, RN, BSN, MA. Ed.
P.O. Box 1304
Hilo, HI 96721-1304
(808) 966-9146

October 22, 1989

William J. Rosdil, Attorney
at Law, A Law Corporation
120 Pauahi Street, Suite 202
Hilo, HI 96720

RE: Soong, et al. vs. The University of Hawaii at Hilo, et al.

Dear Mr. Rosdil:

As I have agreed to be retained by you as an expert witness on behalf of your client, Rosemary Soong, I am providing a report of my review of the available materials and an evaluation and opinion of her nursing care plans, her treatment, tenure and expulsion in 1987 and again in 1988. To date, I have reviewed all the materials provided by your office, as listed in the attached Appendix.

My opinions and evaluation provided in this report are based upon my personal and professional knowledge as a registered nurse of over twenty years and knowledge and experience as an educator of over twelve years. I feel that I am qualified to render my evaluation and opinion since from January 1977 to March 1980, I was an instructor in the nursing program at the University of Hawaii at Hilo/Hawaii Community College. Then from April 1980 to July 1980, I was the Acting Director of the Nursing Programs for UHH/HCC. From August 1980 to August 1982, I was the Director of the Nursing Programs and from September 1982 until February 1986, I was a tenured instructor for the nursing programs at UHH/HCC.

The preparation of this report is based upon my review of the materials as listed in the attached Appendix, which in my understanding does not represent all written materials or depositions of this case. I have based this report on the materials reviewed and listed, and, as other materials and depositions become available, I reserve the option to amend this report, if necessary, to reflect those materials.

The pedagogical approach as clearly stated in the Nursing Program documents, is one of "permissiveness, which enables students to develop to their fullest potential, within the limits of the vocation of (sic) practical nursing". This philosophy and purpose provides the base for the planning of the total educational program. This expectation is shared by educational theory, supported by the Board of Nursing in their Nursing Program Standards and trusted by any, and all prospective and current students of the nursing program as providing a true picture of the program. It is noted that all documents of policies, criteria, expectations and competencies prepared and distributed by the faculty reflect this philosophy and purpose. The expectation that this belief must be reflected by the faculty in practice and appropriately implemented in their direction and guidance of the educational program provided by the school is unquestionable. Other standards, as set forth by the Board of Nursing, are reflected in the documents reviewed and includes the program's comprehensive purposes as specifically stated in the course competencies in nursing which are the expectations used to prepare the graduate.

It is clear that the faculty of the Practical Nursing Program in 1987 and in 1988 did not follow, nor did they

implement, the stated philosophy and competencies of the program. They were not consistent and fair in the application of their own written policies and criteria. With careful examination, it is noted that the faculty's lack of regard for students' learning needs and the learning process is evident. There were questionable teaching practices and the possibility of violation of the Board of Nursing's standards.

There is no substantive documentation to support the request for Rosemary Soong's withdrawal from the Practical Nursing Program at UHH/HCC in 1987 or in 1988. The paucity of written evidence of unsatisfactory clinical performance, the evidence of numerous errors, inconsistencies and contradictions by the faculty, and the expectation of practical nursing students' role in nursing diagnosis, one that is not in line with either national standards or licensing standards, provides little reason for the request for her withdrawal. It does, however, provide a basis for questioning the motives and behavior of Rosemary Soong's instructors and their superiors in regards to her treatment in 1987 and again in 1988.

My conclusion, based on the materials and evidence that I have seen to date, is that Rosemary Soong should never have been asked to withdraw from the Practical Nursing Program in 1987 nor in 1988. I believe that the trust placed by Rosemary Soong in her instructors and in the nursing program was violated. There is little evidence to show that either Mrs. Inaba or Ms. Notz provided sufficient instructional support to enable Ms. Soong "develop to her fullest potential" as well as little evidence to show that these instructors were provided with the administrative leadership and guidance they needed in

carrying out their instructional duties. There is reason to believe that Rosemary Soong was terminated for non-academic reasons.

Thank you for the opportunity to act on behalf of your client. Please feel free to call upon me if I can be of further service.

Respectfully,

/s/ Rosemary K. Burnett
Rosemary K. Burnett, RN, BSN, MA. Ed.

APPENDIX: Documents Reviewed as of 10/15/89

1. Summary of Deposition: Phyllis Ahmadia, 3/6/89 & exhibits
2. Summary of Deposition: Patrick W. Naughton, 3/6/89 & exhibits
3. Copy of Plantiffs' Complaint Civil No. 88-235
4. Summary of Deposition: Genevieve N. Kinney, 3/6/89 & exhibits
5. Summary of Deposition: Genevieve N. Kinney (con't), 4/18/89 & exhibits
6. Summary of Deposition: Sharon E. Hannah, 4/20/89 & exhibits
7. Summary of Deposition: Sharon E. Hannah (con't), 9/14/89
8. Summary of Deposition: Joyce E. Inaba, 8/24/89
9. Spring 1987 Nursing Care Plans: graded by Hannah
10. Spring 1987 Nursing Care Plans: graded by Inaba
11. Spring 1988 Nursing Care Plans: graded by Notz
12. Records of Inaba from 9/14/89 Hannah Deposition

13. Notes of Inaba from 8/24/89 Inaba Deposition
14. Grade books of Hannah from 4/20/89 Deposition
15. UHH Grievance filed 5/15/87 by R. Soong
16. NURS 22 POLICIES Spring 87
17. Handout: TO THE PRACTICAL NURSING STUDENT
18. NURS 22 Spring 88 Nursing Care Plan Grading Criteria
19. NURS 22 Course Competencies
20. Nursing Program Policies AD/PN 1986-1987
21. Class of 1987: Practical Nursing 'Signature list'
22. UHH Student Academic Grievance Complaint Policy (dated: 7/4/86)
23. NCP: PN Program – Master Criteria for NCP (dated: 1/15/88)
24. NURS 22 Clinical Self Evaluation Tool (dated: 2/5/88)
25. Memo: by Sonja Notz Subject: Clinical evaluation – Regarding: R. Soong (dated: 2/8/88)
26. Memo: by Sonja Notz Focus: Probationary Status (dated: 2/9/88)
27. Conference notes: R. Soong, S. Hannah, T. Lai, S. Notz (dated: 2/9/88)
28. Memo: Probationary Evaluation (dated: 2/12/88)
29. Memo: from R. Soong to Genevieve Kinney (dated: 2/16/88)
30. Various notes from interviews from Kobayashi file (dated: 8/17/87 through 10/10/87)
31. Various letters of support written by classmates of R. Soong

32. Department of Commerce and Consumer Affairs, Hawaii Administrative Rules, Chapter 89, Nurses and Chapter 457, Hawaii Revised Statutes, Nurses

Supreme Court, U.S.
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No. 91-162

In The

Supreme Court of the United States

October Term, 1991

JOYCE INABA, SHARON HANNAH, GENEVIEVE KINNEY, LARRY TEST, PATRICK W. NAUGHTON, JANICE KIDO, SONJA NOTZ, WINIFRED TATSUTA, JUDITH MILLER, ELEANOR STERLING and JEANETTE JUSTICE, as Individuals,

Petitioners,

vs.

ROSEMARY SOONG and JAMES SOONG,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

WILLIAM J. ROSDIL
Attorney at Law
A Law Corporation

WILLIAM JAMES ROSDIL*
* Counsel of Record
PAUL KENJI HAMANO

120 Pauahi Street, Suite 202
Hilo, Hawaii 96720
(808) 961-2857

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

1. Are Petitioners, University officials sued in their individual capacity pursuant to 42 U.S.C. § 1983, entitled to qualified immunity where the Respondent has established a factual threshold that her dismissal from the University was a "substantial departure from the accepted academic norm," i.e., a dismissal based on an impermissible non-academic basis, under a clearly established constitutional right substantiating her claim that Petitioners violated her substantive due process right to continued enrollment free from arbitrary dismissal?

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Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents Rosemary Soong and James Soong respectfully request that this Court deny the petition for writ of certiorari which seeks review of the Memorandum Opinion of the Supreme Court of Hawaii filed in this case.

JURISDICTION

A strong threshold consideration that provides a fundamental reason why this Court should deny the petition for writ of certiorari is that the judgment below is not a "final judgment" within the meaning of 28 U.S.C. § 1257.

Petitioners perfected an appeal of the trial court's denial of Petitioners' motion for dismissal, or in the alternative, for summary judgment. Pursuant to Hawaii law, this order was a non-final, non-appealable judgment. *M.F. Williams, Inc. v. City and County*, 3 Haw. App. 319, 324, 650 P.2d 599, 603 (1982); *TBS Pacific, Inc. v. Tamura*, 5 Haw. App. 222, 225-226, 686 P.2d 37, 42 (1984).

The interlocutory appeal from the non-final judgment was taken pursuant to Hawaii Revised Statutes § 641-1(b) (1985). The Supreme Court of Hawaii affirmed the trial court's order denying Petitioners' motion for dismissal/summary judgment, remanding the case back to the trial court for a specific threshold consideration of whether Respondent had "exhausted all her administrative remedies before resorting to judicial action." (Pet. 4a)

It can hardly be disputed that the judgment sought to be reviewed here is a non-final judgment.

The test of "finality" is "whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court." *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942).

To be reviewable, a state court judgment "must be subject to no further review or correction in any other

state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548, 551 (1945).

A judgment of a state court remanding the case for further proceedings, non-ministerial in nature, is not a final judgment and normally is unreviewable by the Court. *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 632-33 (1981).

The policy considerations for the rule of finality aptly serves this case. As stated in *North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 159 (1973):

> (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs.

In this case, even a disposition in favor of Petitioners by this Court on certiorari will not terminate the litigation and further appeals are possible. A determination by this Court would also be premature and advisory since the Supreme Court of Hawaii has determined that a threshold question must first be resolved to determine whether Respondents are even allowed to bring this entire action, unless they can establish exhaustion of administrative remedies. Furthermore, reviewing a case which may not even present a 'case' or 'controversy' of

federal constitutional issues hardly serves the policy of minimum federal intrusion in state affairs.

The case at bar is distinguishable from *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985), which construed the denial of a qualified immunity claim a reviewable collateral order.

In order for an interlocutory or collateral order to be reviewable by this Court, it must "conclusively determine the disputed question." *Coopers & Lybrand v. Livesay*, 437, U.S. 463, 468 (1978); *Mitchell v. Forsyth*, 472 U.S. at 527.

As stated in *Mitchell*, 472 U.S. at 527:

> Even so, the court's denial of summary judgment finally and conclusively determines the defendant's claim of right not to *stand trial* on the plaintiff's allegations, and because "[t]here are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred[.]"

However, in this case, the Supreme Court of Hawaii has remanded the entire case for determination of whether Respondents have exhausted their administrative remedies to determine whether any suit is valid against Petitioners.

What this means is that the trial court has the obligation to determine whether Petitioners will be subject to further discovery and whether they will be subject to further suit unless Respondents can first satisfy the threshold question of the exhaustion of administrative remedies. The trial court has the discretion to dismiss the entire case even before considering any of Petitioners'

contentions. In essence, the qualified immunity issue has not been conclusively determined.

Petitioners have prematurely filed their petition. The petition should be filed after the exhaustion of administrative remedy issue is resolved by the trial court. Only then can it be construed that the disputed question of qualified immunity is conclusively determined. The consideration of whether Petitioners' qualified immunity defense was properly determined below may be moot since the resolution of the exhaustion of remedies issue may bar Respondents' suit.

Allowing the trial court to first determine the exhaustion of administrative remedy issue serves this Court's rule and policy of hearing only final judgments, serves this Court's policy of limiting federal intrusion in state affairs, and promotes judicial economy by sparing this Court from considering an issue and suit which the state court may determine to have been improperly filed.

For this reason alone, the petition should be denied.

STATEMENT OF THE CASE

Central to this case is the factual issue of whether Respondent Rosemary Soong ("Rosemary") was dismissed from the practical nursing program of the Hawaii Community College/University of Hawaii at Hilo ("University") on an academic basis, as Petitioners contend, or in a arbitrary, capricious, ill-motive, or non-academic manner, as Respondents contend.

In the Fall of 1986, Rosemary was accepted into the Practical Nursing Program at the University. [No. 88-235 (Hawaii 1990) Record on Appeal ("RA") Volume IV at 23]. Prior to the start of classes, Rosemary, along with her fellow nursing classmates, was required to read, understand, and actually sign a document acknowledging the review of several of the University's policies. [RA I at 291]. Among those policies was the Student Academic Complaint Policy ("Policy") which stated that the rights contained therein "are regarded as fundamental aspects of the academic relationship between students and faculty members." The Policy, in a section entitled "student academic rights," also stated, *inter alia*:

> *Protection against Improper Academic Evaluation.* Students shall have protection against prejudiced or capricious academic evaluation. Student performance shall be evaluated solely on an academic basis and not on opinions or conduct in matters unrelated to academic standards. * * *

[RA I at 368].

The Policy also contained a section entitled "student academic expectations" which "relate to the responsibilities of the faculty member and the University[,]" and which stated that students have rights, *inter alia*:

> 2. To complete any course in which they are enrolled, provided their conduct is in accord with the Student Conduct Code.
>
> * * *
>
> 7. To receive fair and objective evaluations of their coursework at appropriate times during the semester, including at least one evaluation prior to the last date of course withdrawal.
>
> * * *

> 8. To receive equitable and unbiased treatment within the classroom environment conducive to learning.
>
> * * *
>
> 12. To be free from interference by faculty members or administrators to pursue an academic complaint or grievance, and to be protected against any punitive action because a complaint or grievance was filed.

[RA I at 369].

Rosemary was enrolled in the full semester course of Nursing 20. [RA IV at 23]. Nursing 20 required the passing of written examinations, clinical work, and the successful completion of "nursing care plans." [RA IV at 23]. Her instructors for Nursing 20 were Petitioners Sharon Hannah and Joyce Inaba [RA IV at 23]. Neither Hannah nor Inaba mentioned any significant deficiencies in Rosemary's work and Rosemary completed the course with a grade of "B." [RA IV at 23].

Rosemary progressed to the spring 1987 semester and was enrolled in the full semester course of Nursing 22, again taught by instructors Hannah and Inaba. [RA IV at 23].

The first half of Nursing 22 was instructed by Hannah for the clinical portion of the course. [RA IV at 23]. Hannah's instruction for the first half of the clinical rotation lasted from January 1987 through the middle of March 1987. [RA IV at 41]. Rosemary's nursing care plans for the clinical rotation, graded by Hannah, averaged above passing. [RA IV at 23]. Her written examinations also averaged well above the passing grade. [RA IV at 23]. At no time did Hannah mention that Rosemary's

performance was questionable, either in examinations or clinical work, or that she was in trouble of failing the course. [RA IV at 23].

Indeed, Hannah admitted the following in her sworn deposition testimony: "I will say that while Rosemary was a student of mine, she satisfactorily completed her rotation with me." [RA IV at 42]. Consistent with that evaluation, Hannah also admitted that Rosemary's nursing care plans submitted during her clinical rotation were satisfactory. [RA IV at 45].

Contrary to Hannah's assessment, the director of the nursing program, Genevieve L. Kinney, alleged that she sent to Rosemary in the first half of the course, a memorandum dated February 10, 1987, produced to Respondents during litigation, contending Rosemary was having academic difficulties in Nursing 22. [RA I at 223; 214]. In the 1987 spring semester year, however, Rosemary did not receive this memorandum that was purportedly sent to her. [RA IV at 23].

The second half of the clinical rotation was taught by Inaba. [RA IV at 24]. In the very first nursing care plan assignment returned by Inaba to Rosemary, Inaba refused to grade Rosemary's work. [RA IV at 24]. Sensing something was wrong, Rosemary met with Inaba and asked for a grade with helpful comments so she could improve. [RA IV at 24]. Instead, Inaba could not identify Rosemary's problems except for what she termed "spelling errors." [RA IV at 24].

Rosemary then sought the help of tutors in the class, but even the tutors were puzzled by the critical grading that Rosemary received by Inaba. [RA IV at 24].

On or about April 20, 1987, Rosemary again received her nursing care plan ungraded by Inaba. [RA IV at 24]. Rosemary went to the Director of Nursing, Kinney, to obtain her assistance in having Inaba grade her work so she could have a basis for improvement. [RA IV at 24].

Rosemary then met with Inaba who informed Rosemary in a threatening manner that if she did not withdraw from the Program, Inaba would give her fourteen "Fs." [RA IV at 24a]. Inaba's reason for insisting that Rosemary withdraw was that she could not write. [RA IV at 24a].

Later, Inaba handed Rosemary a document entitled "Request For Student Withdrawal" saying that it was "hot off the presses." [RA IV at 24a]. Inaba also told Rosemary at this time that it was too bad since instructor Hannah thought she was doing well. [RA IV at 24a]. Indeed, as for objective, written examinations, Rosemary had satisfactory grades. [RA IV at 24; RA I at 226].

Rosemary's termination occurred several weeks before final examinations. [RA IV at 24a]. Prior to her being asked to withdraw, Rosemary was not warned of her alleged "poor" clinical performance. [RA IV at 24a].

Rosemary then met with University exiting counselor, Larry Test, seeking his approval for her withdrawal. [RA I at 8]. Test indicated to Rosemary regarding her inquiry of filing an academic grievance that if he were her, he would not file the grievance if she had intentions of returning to the Program. [RA I at 9, Paragraph 41].

Rosemary then filed an academic grievance against Inaba and the Program with Janice Kido, the General

Education Chairperson, and Patrick Naughton, the Acting Provost. [RA IV at 25]. Rosemary's written grievance to Kido and Naughton dated May 15, 1987 contained a detailed account of the situation leading to her forced withdrawal in 1987. [RA I at 345-353].

Both Kido and Naughton dismissed Rosemary's grievance. [RA IV at 24a]. However, previous to his denial of Rosemary's grievance, Naughton sent a confidential internal memorandum, dated April 27, 1987, to Hannah and Inaba, through Kinney, which stated in part:

> I want you to understand that I do not question your right to fail students or to ask them to withdraw from your classes. My concern has to do with the timing of this action. I believe it is very unfair to Rosemary as a student and a person to wait so late in the semester to initiate this action.
>
> I hope that in the future, weeding out will occur much earlier in the student's career.

[RA IV at 27].

Rosemary's grievance continued to the formal academic grievance committee process. [RA IV at 24a; 29]. However, the committee was never convened and the University allowed Rosemary back into the Program, waiving her tuition. [RA IV at 29]. Phyllis Ahmadia, Chairperson of the Academic Grievance Committee, wrote a letter to the chancellor of the University, Edward Kormondy, dated January 6, 1988, that stated in part:

> She [Rosemary] has further agreed in writing to suspend her grievance although she may reassert it at her option. All the parties do not believe this is likely and we expect that Ms.

Soong will successfully complete the practical nursing course.

[RA IV at 29].

In the first half of the 1988 Spring semester in the Nursing 22 course, Rosemary had Petitioner Sonja Notz as her instructor for the clinical portion of the course. [RA IV at 25]. At the very beginning of the semester, Notz sent to Rosemary a memorandum alleging thirty (30) some odd points of deficiencies in Rosemary's performance. [RA IV at 25; RA I at 297-299]. Rosemary was shocked at these allegations, some of which penalized her for asking for help. [RA IV at 25; RA I 297-299].

Sensing that the Program had received her back without any intention of helping her succeed, with their only purpose to terminate her from the Program "the right way", Rosemary became very upset. [RA IV at 25]. Apparently, Rosemary's emotional distress was so severe that Notz took Rosemary to a public mental health clinic. [RA IV at 25].

In Notz's last memorandum to Rosemary while in the Program, dated 2-12-88, Notz also included a "Special Note" at the end of the memorandum indicating Rosemary had a "very big mouth." [RA IV at 25; RA I at 302-304]. Upon reading this note, Rosemary felt shock and experienced distress because it had become clear to her that neither Notz nor the individuals running the Program at the University had any intention of helping her or treating her fairly. [RA IV at 25].

The University's Admissions and Progression Committee, composed of Hannah, Kinney, Larry Test, Winifred Tatsuda, Judith Miller, Eleanor Sterling, and Jeanette Justice, recommended that Rosemary be dropped from the Program. [RA I at 13].

After the suit was filed against Petitioners and the University, Respondents supported their opposition to Defendants' motion for dismissal/summary judgment with a copy of a report by Rosemary Burnett, their expert witness. [Pet. 52a-57a] Burnett was a tenured nursing instructor for many years at the University and its Director of Nursing for over two years. [Pet. 48a-49a]. It was Burnett's opinion that Rosemary should not have been terminated in 1987 nor 1988, that she was unfairly treated, that the nursing program did not follow its own criteria and guidelines, and from all of this, that there was reason to believe that Rosemary was terminated for *non-academic reasons*. [Pet. 54a-55a].

Petitioners' motion was denied by the trial court. On interlocutory appeal, the Supreme Court of Hawaii affirmed the decision. Petitioners' motion for reconsideration, which again addressed the qualified immunity issue, was denied.

REASONS WHY THE PETITION SHOULD BE DENIED

This case does not merit consideration by this Court. The decision of the Supreme Court of Hawaii turned on a factual issue that underlies this entire case, which Petitioners refuse to recognize: that Respondent Rosemary

Soong was terminated for an improper non-academic reason.

The decision of the Supreme Court of Hawaii is an unpublished memorandum decision. It carries no precedential value in the State of Hawaii[1], nor in any other state court of last resort, nor of the United States court of appeals. The decision turned on a factual issue. It did not create new law. It did not decide a federal question in a way that conflicts with the decision of a state court of last resort or of a United States court of appeals.

Moreover, the Supreme Court of Hawaii did not decide an important question of federal law but instead followed closely this Court's decision in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985) and determined that factually, Respondents stated a cause of action under 42 U.S.C. §1983, and that Respondents were not entitled, as a matter of law, to qualified immunity.

A. THE RESOLUTION OF THIS CASE ADDS NOTHING TO THE ALREADY ESTABLISHED LAW OF QUALIFIED IMMUNITY.

1. Petitioners merely seek to have this Court re-evaluate the facts presented in this case.

The Supreme Court of Hawaii held that upon a "careful review of the record," the facts supported

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[1] Rule 35(c) of the Hawaii Rules of Appellate Procedure states: "Citation. A memorandum opinion shall not be cited in any other action or proceeding except when the opinion establishes the law of the pending case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same respondent.

Respondents' allegation that Rosemary's termination was a substantial departure from the academic norm. (Pet. 4a). In essence, Rosemary was terminated from continued enrollment in her University program for an impermissible, non-academic reason. Her termination was not the result of an exercise of professional judgment.

It is on this *factual* basis that the Supreme Court of Hawaii found that Rosemary came within the parameters of *Regents v. Ewing, supra,* for judicial review of her academic dismissal under the framework of a substantive due process protection of her property interest in continued enrollment, free from arbitrary, non-academic dismissal.

"Property interests" protected by due process are "defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972). Agreements implied from the promissor's words and conduct in light of the surrounding circumstances, i.e., express or implied contracts, could be independent sources of property interests. *Perry v. Sindermann,* 408 U.S. 593, 601, 602 (1972). A protected property interest may attach to any such understanding, that in substance, give rise to an "individual entitlement which cannot be removed except for cause.' " *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 430 (1982).

The University's Student Academic Complaint Policy provides a firm basis for Rosemary's property right. It states explicitly that students such as Rosemary have a right to protection from "improper," "prejudiced," "capricious" evaluation, and a right to be evaluated solely on

an academic basis. The policy was formulated and issued by the University and Rosemary was required to read and understand it. A document evidences Rosemary's signature and acknowledgement that she read and understood the Policy. Whether the Policy be deemed an understanding, an express or implied contract, or a state entitlement, the right to continued enrollment free from arbitrary, non-academic dismissal was in fact a property right in this case.

The Supreme Court of Hawaii had long ago held that a deprivation of a "legitimate claim of entitlement" to benefits under state law or regulation, if claimed under a "clearly implied promise" are property rights entitled to due process protection. *Kekoa v. Supreme Court*, 55 Hawaii 104, 108, 516 P.2d 1239 (1973), *cert. denied*, 417 U.S. 930 (1974).

This case is unlike *Regents v. Ewing, supra*, in that the property right here is more clearly established under Hawaii law.

Thus, under the particular and compelling facts of this case, the Supreme Court of Hawaii determined that Respondents sustained a cause of action pursuant to *Regents v. Ewing, supra*. Such a determination was also in accord with its own decision in *Kekoa v. Supreme Court, supra*.

The Supreme Court of Hawaii did not change or create new law, but applied the facts presented to existing law. Furthermore, it did so in a way that did not establish future precedent.

2. The facts established below supported the determination that Petitioners were not entitled to qualified immunity and the Supreme Court of Hawaii did not misapply the law.

At the time Petitioner's motion for dismissal/summary judgment was decided and rejected by the trial court, and the decision affirmed on appeal by the Supreme Court of Hawaii, this Court had firmly established the law of qualified immunity as it pertains to suits against government officials in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), *Mitchell v. Forsyth,* 472 U.S. 511 (1985), and *Anderson v. Creighton,* 483 U.S. 635 (1987).

Petitioners cited to and explained both *Harlow* and *Anderson* at the trial court, and all three cases to the Supreme Court of Hawaii.

The Supreme Court of Hawaii in no way misapplied or changed the qualified immunity doctrine. To the contrary, the Hawaii Intermediate Court of appeals mirrored this Court's qualified immunity doctrine in a 42 U.S.C. §1983 case in *Makanui v. Department of Education,* 6 Haw. App. 397, 407, 721 P.2d 165, 172 (1986). Petitioners' contention that the Supreme Court of Hawaii failed to understand the qualified immunity doctrine is unfounded.

Petitioners fail in their qualified immunity defense if their conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). The defense normally fails if the law was clearly established at the time of the alleged conduct "since a reasonably competent public official should know the law governing his conduct." *Harlow,* 457 U.S. at 819.

While it has been well settled that discovery should not proceed in a qualified immunity claim until the threshold question of whether the law was "clearly established" at the time of the actionable conduct, *Mitchell v. Forsyth*, 472 U.S. at 426, Petitioners here waived this right to a degree as they filed their motion to dismiss/summary judgment on March 22, 1990, nearly two years after the complaint was filed.

By the time Petitioners raised the qualified immunity issue before the lower court, Respondents had already gathered enough evidence to show that Petitioners violated a clearly established constitutional right of Rosemary. As held in *Mitchell*, 472 U.S. at 526:

> Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.

The Supreme Court of Hawaii, after carefully reviewing the record, determined that there was a genuine issue as to whether Petitioners terminated Rosemary for a non-academic reason that did not reflect professional judgment. This factual determination is Petitioners' main complaint with the lower courts.

In *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) this Court explained the threshold element of "clearly established law" in the qualified immunity doctrine:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

> *This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful,* see *Mitchell, supra,* 472 U.S., at 535, n. 12, 105 S.Ct., at 2820, n. 12; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

(emphasis added).

At the time of Petitioners' alleged wrongful acts in 1987 and 1988, it was explicitly clear that evaluation of a student on a non-academic, arbitrary and/or capricious manner was unlawful. The University's own edicts in the form of the Student Academic Complaint Policy expressly prohibited this type of conduct by Petitioners.

Together with this Court's decision in *Regents v. Ewing, supra,* and the Supreme Court of Hawaii's decision in *Kekoa v. Supreme Court,* 55 Hawaii 104, 108, 516 P.2d 1239 (1973), which held in 1973 that a deprivation of benefits from government if claimed under a "clearly implied promise" are property rights entitled to due process protection, it was proper for the Supreme Court of Hawaii to determine that under the particular circumstances of this case, the constitutional right was clearly established and that Petitioners should have known their acts violated Respondent Rosemary Soong's constitutional rights.

In *Regents v. Ewing, supra,* this Court determined that the facts presented did not establish any constitutional violation and therefore it was unnecessary to rule on the constitutional issue. However, this Court made explicitly clear that a court may override an academic decision

where it is a "substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Regents v. Ewing*, 474 U.S. at 225.

It can hardly be questioned that the framework for the constitutional right was firmly established by this Court in the hypothetical factual situation that was not before this Court in *Ewing*. Terminating a student for a non-academic reason was clearly known by Petitioners to be prohibited. *Ewing* made this clear. Petitioners have also cited to this Court numerous cases where the courts have acknowledged that a constitutional violation is established, under the proper factual circumstances, where it is shown that the student was terminated for non-academic reasons.

Petitioners reason that because *Ewing* assumed without deciding whether a substantive due process right to continued enrollment existed, that this alone along with numerous other cases following the same ruling, confirms that the right was not clearly established.

Petitioners' reasoning is flawed. To accept Petitioners' reasoning is to always grant immunity to school officials who are accused and are proved to have terminated a student in bad faith or for a non-academic reason. The school official could well admit that he/she in fact terminated a student for an impermissible non-academic reason and still be protected by qualified immunity.

This Court did not intend to bring about such a preposterous result in the use of qualified immunity. As this Court has aptly stated, "[b]y defining the limits of

qualified immunity essentially in objective terms, we provide no license to lawless conduct." *Harlow v. Fitzgerald,* 457 U.S. at 819.

We are reminded by this Court's statement in *Anderson v. Creighton,* 483 U.S. at 640, that Petitioners do not establish immunity merely because the very action in question was not previously held unlawful. Instead, like this case, pre-existing law made it "apparent" that to terminate a student for an impermissible non-academic reason was unlawful.

There are peculiar and compelling facts in this case. In light of pre-existing law and other circumstances, the Supreme Court of Hawaii made a legal determination, as did the trial court below it, that the constitutional right of Rosemary was "clearly established."

Petitioners merely disagree with the lower court's assessment of the facts presented and not the law. Instead, Petitioners want this Court to re-evaluate the facts as presented. Under such circumstances, review by this Court is unwarranted.

3. This Court's recent rulings in *Siegert v. Gilley* and *Burns v. Reed* do not change the law of qualified immunity and remand for consideration of these cases would be fruitless.

Siegert v. Gilley, 111 S.Ct. 1789 (U.S. May 23, 1991) reaffirmed the qualified immunity doctrine established in *Harlow.* What was notable in *Siegert* was that the alleged constitutionally protected interest asserted by the petitioner was, prior to the alleged conduct, held by this court to be conclusively not a protected constitutional

interest. *Siegert v. Gilley*, 111 S.Ct. at 1794. Therefore, as a matter of law, there did not exist a "clearly established" right at the time of the alleged wrongful conduct, and therefore, qualified immunity was established pursuant to *Harlow, supra.*

In this case, *Regents v. Ewing, supra,* decided in 1985, had the opportunity to explicitly reject the constitutional claim asserted by Respondents, but refused to do so. If anything, *Siegert* reinforces and supports the decision of the Supreme Court of Hawaii.

Burns v. Reed, 111 S.Ct. 1934 (U.S. May 30, 1991), also adds nothing to the qualified immunity doctrine. In *Burns,* this Court addressed the applicability of the *absolute* immunity doctrine to state prosecutors in their various duties. Respondents are at a loss as to why a consideration of *Burns* could justify a remand. This would not only be improper, but would be a certain waste of judicial resources.

It should be plain that the decisions in *Siegert* and *Burns* are inapplicable to this case. That Petitioners are calling for a review of this case in light of *Siegert* and *Burns* only mirrors the weakness of Petitioners' arguments which reflect that this case does not merit this Court's consideration.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Dated: Hilo, Hawaii, August 28, 1991.

WILLIAM J. ROSDIL
Attorney at Law
A Law Corporation

WILLIAM JAMES ROSDIL*
*Counsel of Record
PAUL KENJI HAMANO

120 Pauahi Street, Suite 202
Hilo, Hawaii 96720
(808) 961-2857

Counsel for Respondents

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No. 91-162

In The

Supreme Court of the United States

October Term, 1991

JOYCE INABA, SHARON HANNAH, GENEVIEVE KINNEY, LARRY TEST, PATRICK W. NAUGHTON, JANICE KIDO, SONJA NOTZ, WINIFRED TATSUTA, JUDITH MILLER, ELEANOR STERLING and JEANETTE JUSTICE, as Individuals,

Petitioners,

vs.

ROSEMARY SOONG and JAMES SOONG,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITIONERS' REPLY MEMORANDUM

WARREN PRICE, III*
Attorney General
State of Hawaii
*Counsel of Record

GIRARD D. LAU
STEVEN S. MICHAELS
Deputy Attorneys General
State of Hawaii

425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1363

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Petitioners,

vs.

ROSEMARY SOONG and JAMES SOONG,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITIONERS' REPLY MEMORANDUM

I. ARGUMENT

A. The Hawaii Supreme Court's Decision Rejecting Qualified Immunity for Petitioners is an Appealable "Final Judgment" within this Court's Jurisdiction.

Respondents are plainly wrong in their contention that jurisdiction does not lie in this Court to review the State courts' denial of Petitioners' claim of qualified immunity. All of respondents' general discussion about "finality" and various formulations of it are simply of no

consequence in light of this Court's specific recognition of the finality of denials of claims of qualified immunity in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). *Mitchell* makes clear that denials of claims of qualified immunity are appealable "final judgments" under the "collateral order" rule. *See* 472 U.S. at 524-30; *see also Siegert v. Gilley*, 111 S. Ct. 1789, 1793-94 (1991).

Respondents' only ground for avoiding *Mitchell*'s applicability is the fact that the Hawaii Supreme Court, in rejecting Petitioners' claim of qualified immunity, remanded to the state trial court with the instruction that it consider whether respondent Soong had exhausted all her administrative remedies. Respondents claim this instruction defeats the finality of the rejection of qualified immunity because the case may never get to trial (were the trial court to dismiss the case on the exhaustion matter). This claim is wrong. Both *Mitchell* and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), upon which *Mitchell* is based, make clear that immunity relieves government officials not only of actual damage liability and the burdens of *trial*, but also the burden of *pretrial* matters, including discovery, that can be equally "disruptive of effective government." *See Mitchell*, 472 U.S. at 526.

The Hawaii Supreme Court's remand will force petitioners to bear the burden of litigating the exhaustion issue and subject them to discovery on that and potentially other issues. It is precisely such burdens that qualified immunity was designed to avoid. Indeed, in *Siegert v. Gilley*, 111 S. Ct. 1789 (1991), this Court confirmed that " 'discovery should not be allowed' " on *any* issue until the " 'threshold immunity question' " is resolved. *Id.* at

1793 (quoting *Harlow*). It is irrelevant to *Mitchell* appealability that, after further proceedings, the case against defendants might be mooted, for it is the very process of determining those issues that immediately infringes the rights conferred by qualified immunity.[1]

B. Review Should Be Granted to Correct the Hawaii Courts' Obvious Misapprehension of Qualified Immunity Precepts.

Petitioners' primary contention is that there is no clearly established *substantive* due process right to continued enrollment free from arbitrary dismissal, and thus petitioners (having been sued only for damages under § 1983) should be dismissed from the suit under qualified immunity. *See* Pet. at 12-23. Respondents' brief never even deals with this claim and proves precisely why the writ of certiorari should issue here.

Respondents' consistent response to the Petition's claim that there is no clearly established *substantive* due process right of review of academic decisionmaking is to seek to bury the Petitioners in the asserted "*factual* basis" of the decision of the Supreme Court of Hawaii. *See* Resp.

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[1] Jurisdiction is also proper under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477, 481-82 (1975), under the rule allowing jurisdiction here where, "if [petitioners] were to lose on the merits [below], however, the governing state law would not permit him again to present his federal claims for review." Here there is no guarantee that the trial court would again grant an interlocutory appeal under § 641-1(b), Haw. Rev. Stat., or that state appellate courts would entertain an appeal under Hawaii's own version of the collateral order doctrine. Respondents do not have any answer to this basis for review.

Br. at 14. Thus, Respondents rely on the claim "that there was a genuine issue as to whether Petitioners terminated Rosemary for a non-academic reason that did not reflect professional judgment," terming the decision below as a "factual determination." *Id.* at 17.

The notion, however, that the lower courts' "factual determination" is Petitioners' "main complaint" (Resp. Br. at 17) could not be more wrong, for, even if, *in fact*, Petitioners *did* terminate Rosemary for non-academic reasons, that would *not* be determinative of Petitioners' qualified immunity claim.

First, as this Court held in *Siegert v. Gilley*, 111 S. Ct. 1789 (1991), "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Id.* at 1793. Contrary to the position taken by respondents, this Court in *Regents v. Ewing*, 474 U.S. 214 (1985), expressly *reserved* the issue whether claims of "arbitrary and capricious" dismissal (there from medical school) state "a violation of a constitutional right at all." Respondents fundamentally ignore the structure, and express language, of *Ewing*, in asserting that *Ewing* established a right to federal "judicial review of her academic dismissal under the framework of a substantive due process protection." *See* Resp. Br. at 14. Indeed, Respondents make the absurd argument that, because *Ewing* "refused" to "explicitly reject the constitutional claim asserted by Respondents," Resp. Br. at 21, Petitioners' actions violated clearly established law.

This reading of precedent turns this Court's judgments on their head. Accepting it would flout the *Ewing* majority's considered postponement whether there was "a constitutional right at all" to substantive due process, and numerous other decisions of this Court postponing important federal issues.

This Court's determination to abstain from deciding difficult federal questions at the least ought to carry with it the message that the issues being postponed are not "clearly established," and, on this front, Respondents simply have no answer to the claim (*see* Pet. at 13-18) that the Supreme Court of Hawaii simply did not follow "a precedent of this Court." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam).

Second, Respondents do not even respond to the numerous decisions in the federal courts of appeals that conflict with the judgment below, and which counsel review and reversal on the basis of their holdings that the substantive due process right at issue here may not (or does not) exist. *See, e.g., Mauriello v. University of Medicine and Dentistry of New Jersey*, 781 F.2d 46, 52 (3d Cir. 1986); *Crook v. Baker*, 813 F.2d 88, 100 & n.7 (6th Cir. 1987); *Akins v. Board of Governors of State Colleges and Univs.*, 840 F.2d 1371, 1376 (7th Cir. 1988); *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986); *Haberle v. University of Alabama in Birmingham*, 803 F.2d 1536, 1539 n.1 (11th Cir. 1986). *See also Lum v. Jensen*, 876 F.2d 1385, 1389-90 (9th Cir. 1989) (public employment context). Respondents' default in the face of this precedent is an added factor that warrants granting the writ of certiorari here.

Third, even if the foregoing did not counsel review, Respondents have failed to overcome the reasons for granting review on the Petition's alternative theory (Pet. at 23-25) that, on Respondents' own reading of the record, the Supreme Court of Hawaii's judgment still cannot stand, for "whether Defendants actually followed university guidelines on dismissal and whether Soong's dismissal was a substantial departure from accepted academic norms" (Pet. App. at 4a) does *not* signify that Petitioners were " 'plainly incompetent' " or " 'knowingly violate[d] the law.' " *Burns v. Reed*, 111 S. Ct. 1934, 1944 (1991). The issue, for qualified immunity purposes, is whether it would be "objectively legally reasonable" to believe that "accepted academic norm[s]" were followed, whether they were or not in fact. *Anderson v. Creighton*, 483 U.S. 635, 644 (1987). Respondents have no answer to this, and the writ should thus issue.

Fourth, Respondents spend much time trying to prove that there is clearly established *state* contract law protection for continued enrollment, *see* Resp. Br. at 14-15, 18, that rises to the level of a "property interest" protected by due process. But this contention, at most, is related only to a claim for deprivation of *procedural* due process, not *substantive* due process. *See Ewing*, 474 U.S. at 223 (majority choosing to assume, rather than to decide, the existence of a *substantive* due process right); 474 U.S. at 229 (Powell, J., concurring) (arguing, without refutation by the majority, that substantive due process rights are created only by the Constitution, and not by state law). Respondents, in their federal claim below, did not raise a procedural due process claim (*see* Pet. App. at 35a), and the Supreme Court of Hawaii did not treat

Respondents' federal cause of action as seeking procedural relief (*see* Pet. App. at 3a-4a). On this sort of record, this Court will "deal with the case as it came here and affirm or reverse based on the ground relied upon below." *Peralta v. Heights Medical Center*, 485 U.S. 80, 86 (1988).[2]

Fifth, Respondents' ultimate argument consists of urging the Court, as a matter of policy, to jettison the immunity rule. Thus, Respondents claim that "[t]o accept Petitioners' reasoning is to always grant immunity to school officials who are accused and are proved to have terminated a student in bad faith or for a non-academic reason," and, indeed, "[t]he school official could well admit that he/she in fact terminated a student for an impermissible non-academic reason and still be protected by qualified immunity." Resp. Br. at 19. This assertion is

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[2] The only case support cited in opposition with respect to the merits of Petitioners' immunity defense other than *Ewing* (which is mis-cited), are decisions of this Court dealing solely with procedural due process matters, e.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), and *Kekoa v. Supreme Court*, 55 Haw. 104, 516 P.2d 1239 (1973), also a procedural due process case. *See* Resp. Br. at 14, 15, 18. There is no indication in the record below that Respondents ever advanced a procedural due process theory in the Hawaii courts.

Even if Respondents had relied upon a procedural due process theory, the writ should nonetheless still be granted as the judgment below provides authorization for a recovery that exceeds the scope of procedural due process protection. *See Carey v. Piphus*, 435 U.S. 247, 264-65 (1978), quoted in *Memphis Community School District v. Stachura*, 477 U.S. 299, 309 (1986).

simply wrong. Not only does it beg the question "whether the plaintiff has asserted a violation of a constitutional right at all," *see Siegert*, 111 S. Ct. at 1793, it far overstates the situation. The issue of immunity for Respondents' federal cause of action has no bearing upon potential state law claims. Nor does immunity bear, necessarily, upon a claim for federal equitable relief, the principal means for assuring compliance with the supreme law. *Papasan v. Allain*, 478 U.S. 265, 277-78 (1986). All that is being asked of this Court here is enforcement of the "protective" doctrine of qualified immunity, *see Burns v. Reed*, 111 S. Ct. at 1944, which protects public litigants who have, at worst, "gambled and lost" on the "resolution of . . . open question[s]" of federal constitutional law from the potentially crushing burdens of litigation under 42 U.S.C. § 1983. *See Mitchell*, 472 U.S. at 535. Accordingly, review is warranted.

C. At the Very Least, this Court Should Vacate And Remand for Further Consideration in Light of the Clarification of Immunity Precepts in *Siegert v. Gilley* and *Burns v. Reed*.

Although this Court, in its recent decisions in *Siegert v. Gilley*, 111 S. Ct. 1789 (1991), and *Burns v. Reed*, 111 S. Ct. 1934 (1991), significantly clarified the role of qualified immunity in personal damage suits under 42 U.S.C. § 1983, Respondents urge that not even a remand is in order to allow the Supreme Court of Hawaii to evaluate, in the first instance, the impact of these recent decisions. Respondents here are wrong.

At a very minimum, the Supreme Court of Hawaii postponed the immunity inquiry until after other issues, which the court below perceived as more important, were resolved. *Siegert* makes absolutely clear that this approach is error. Just as the District of Columbia circuit erred in "[a]ssuming without deciding" the immunity questions in *Siegert*, here the Hawaii courts committed obvious error in failing to first resolve the "purely legal question[s]" pertaining to Petitioners' immunity. *See Siegert*, 111 S. Ct. at 1793. At least, this case should be remanded for further consideration in light of *Siegert*, even if this Court is "not certain that the case [is] free from all obstacles to reversal on an intervening precedent." *Henry v. City of Rock Hill*, 376 U.S. 776, 776 (1964) (per curiam).

Likewise, the Supreme Court of Hawaii, before being permitted to commit Petitioners to an extensive round of trial level (and further appellate) litigation, should be required to give further consideration to Respondents' federal claim in light of *Burns v. Reed*, 111 S. Ct. 1934 (1991), where this Court greatly clarified the "protective" nature of qualified immunity from § 1983 damages actions. *See id.* at 1944 and n.8 (noting, for the first time, that qualified immunity, as " 'completely reformulated' " by this Court "satisifies one of the principal concerns underlying our recognition of absolute immunity"). It is elementary that "a precedent of this Court must be followed by the lower federal [and state] courts." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam). At a minimum, vindication of this principle requires granting the writ, and vacating and remanding for further consideration in light of *Siegert* and *Burns*, whose guidance the

Supreme Court of Hawaii lacked at the time it decided Petitioners' recent appeal.

II. CONCLUSION

For the reasons above and in the Petition, this Court should grant the writ and ultimately reverse the judgment of the Hawaii Supreme Court with respect to Respondents' claims against Petitioners. Alternatively, this Court should grant the Petition, vacate the judgment as to the claims against Petitioners, and remand for further consideration in light of *Siegert v. Gilley*, 111 S. Ct. 1789 (U.S. May 23, 1991), and *Burns v. Reed*, 111 S. Ct. 1934 (U.S. May 30, 1991).

Dated: Honolulu, Hawaii, September 18, 1991.

WARREN PRICE, III*
Attorney General
State of Hawaii
*Counsel of Record

GIRARD D. LAU
STEVEN S. MICHAELS
Deputy Attorneys General
State of Hawaii

425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1363

Counsel for Petitioners